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INTRODUCTORY NOTE

TITLE: PUBLIC POLICY AND CANADIAN FEDERALISM  
by Professor Donald V. Smiley

NOTES:

The table of contents to Professor Smiley's study is detailed enough to make it possible for the reader to find his way through the report with ease.

I found Chapter 7 the most important part of the study and it is, indeed, a chapter which I would like to see Professor Smiley expand.

The entire report must, I believe, be considered as one of very high priority in any reading schedule. It will be discussed in January by the Commission in Committee-of-the-whole.

Michael Oliver  
Director of Research








## PUBLIC POLICY AND CANADIAN FEDERALISM

A Study Prepared for the Royal Commission  
on Bilingualism and Biculturalism

by Donald V. Smiley, Professor of Political Science,  
University of British Columbia, with the assistance  
of W. P. Irvine.





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## INDEX

<u>Chapter</u>		<u>Page</u>
1.	FEDERALISM AND THE PUBLIC POLICY PROCESS	1
2.	POST-WAR CANADIAN FEDERALISM. THE "NEW NATIONAL POLICY".	18
	The Session of 1944-45	21
	The White Paper on Employment and Income	23
	Public Health	28
	Social Security	29
	Natural Resources Development and Public Investment	30
	The Rationale of the New National Policy	32
	A Digression: Federal Policies toward Culture	38
	The New National Policy 1946-1960	40
	Fiscal Arrangements	41
	Public Health	41
	Natural Resource Development and Transportation	43
	Notes	46
3.	POST WAR CANADIAN FEDERALISM. THE ATTENUATION OF FEDERAL DOMINANCE	47
	Deficiencies in Federal Economic Policies	47
	New Directions in Quebec	54
	Provincial Economic Interventionism	57
	The Increasing Importance of Provincial Expenditures	61
	Summary and Conclusions	62
	Notes	64
4.	DEVICES OF ADJUSTMENT IN THE CANADIAN CONSTITUTION	65
	The Confederation Settlement and the Distribution of Powers	65
	Devices of Adjustment I: Constitutional Amendment	69
	Devices of Adjustment II: Judicial Review	70
	Devices of Adjustment III: The Quasi-Unitary Features of the Constitution	75
	Devices of Adjustment IV: The Federal Spending Power	80
	Devices of Adjustment V: The Particularity of the Position of the Individual Provinces	86
	Devices of Adjustment VI: The Inter-Governmental Delegation of Powers	93
	Devices of Adjustment VII: The Federal Emergency and Defence Powers	99
	Devices of Adjustment: Summary and Conclusions	105
	Notes	107
5.	FEDERAL CONDITIONAL GRANTS TO THE PROVINCES	110
	Circumstances Favouring the Development of Conditional Grants	111
	The Interaction of Federal and Provincial Purposes in the Conditional Grant Programmes	115
	Conditional Grants from 1960 Onward	124
	The Medicare Proposal: An Alternative to Conditional Grants?	129
	Notes	133







Chapter

	<u>Page</u>
6. A UNIQUE DEVICE OF ADJUSTMENT: THE CONTRACTING-OUT PROCEDURE	135
The 1959 University Finance Agreement	135
Contracting-Out of Conditional Grant Programmes	140
Contracting-Out of Exclusively Federal Programmes	145
A Partial Application of Contracting-Out: The Federal-Municipal Loan Fund	150
The Significance of the Contracting-Out Device	152
Notes	158
7. DEVICES OF ARTICULATION: THE INSTITUTIONS AND PROCEDURES OF CO-OPERATIVE FEDERALISM	159
Co-Operative Federalism Prior to 1945	164
Post-War Canadian Federalism: The Dominance of Programme Collaboration	170
The New Directions of Co-Operative Federalism: Collaboration in General Policies	174
Procedures and Institutions of Federal-Provincial Collaboration	182
Policy Conflicts in Federal-Provincial Relations	190
Inter-Provincial Relations	196
Co-Operative Federalism and the New Quebec	199
Notes	213
8. CO-OPERATIVE FEDERALISM: AN EVALUATION	217
Co-Operative Federalism and Public Policy Effectiveness	219
The Politics of Co-Operative Federalism	227
Co-Operative Federalism and the Role of the Federal Government	231
Co-Operative Federalism and Constitutional Change	235
Notes	244

*Critique by Paul Dussault following p. 244  
le fédéralisme exécutif: critique de la  
thèse du professeur Smiley*







## CHAPTER I

### Federalism and the Public Policy Process.

The major focus of this study is the making and implementing of public policy within the framework of Canadian federal institutions. Our primary concern is the relations between the executive officials, both elected and appointed, of the federal and provincial governments. Under the circumstances which have developed, each jurisdiction retains the responsibilities for broad areas of public functions but there are an increasing number of situations in which the action of each in pursuing its objectives impinges on the activities of the other. The ways by which the central and regional administrations respond to this kind of mutual dependence has been neglected by students of the Canadian and other federal systems.

Traditional discussions of federalism emphasize the co-ordinate and independent powers of the federal and regional governments rather than their interdependence. According to the juridical analysis found in the textbooks of law and political science, there are three possible ways of legally organizing a particular territory. The first alternative is unitary - the government whose jurisdiction includes the whole territory is sovereign and whatever other public authorities there may be are legally subordinate to it. At the other end of the spectrum is the confederacy where the powers of the central jurisdiction are held at the discretion of the regional governments. The third alternative is federalism and there would be broad agree-







ment among constitutional scholars that a constitution which can be defined as federal has these characteristics:

1. The totality of governmental powers which can legally be wielded within a territory are divided by a written constitution between a central and two or more regional governments.
2. Those parts of the constitution which so delineate governmental powers are not subject to interpretation or amendment by the unilateral action of the executive or legislature of either level of jurisdiction.
3. At least one of the legislative chambers of the federal government is chosen by popular election.
4. Individual residents of the federation are directly subject to the laws of both the central and the regional governments.

The kind of definition given above is static and relates to the formal constitutional features of federal systems without regard to how these systems do in fact operate. Using this kind of formulation one could read the constitutions of various countries and inter-governmental associations and quickly and mechanically determine which qualified as federations. But in almost all cases the actual workings of political systems diverge widely from what one would expect by a literal reading of their constitutions. K. C. Wheare, whose influential book emphasizes the co-ordinate authority and mutual independence of central and regional governments as the essential features of federalism,







recognizes this difficulty and makes an important distinction between "federal constitutions" and "federal governments".<sup>1</sup> According to Wheare's analysis, the Canadian constitution is only "quasi-federal" because of the powers conferred upon the federal executive to disallow provincial legislation and the appointment of the provincial Lieutenant-Governors and judges of the principal provincial courts by the Governor-in-Council. However, in examining the actual practices of Canadian government he concludes ".....although the Canadian constitution is quasi-federal in law, it is predominantly federal in practice. Or to put it another way, although Canada has not a federal constitution, it has a federal government."<sup>2</sup> This kind of formulation seems to us deficient in that the somewhat facile dichotomy between the law of the constitution and the practices of government allows one to avoid any analysis of the intricate relationships between the two kinds of matters in studying particular political systems. Furthermore, the undue emphasis on the co-ordinate and independent relationships of the central and regional governments predisposes the student either to ignore the patterns of interactions between the two levels which are so much a part of the workings of established federations or to consider these interactions as somehow a deviation from the federal principle.

Federalism may thus usefully be considered as an ongoing process by which governmental powers are exercised.







In his recent work Carl J. Friedrich contrasts federalism as "consensual world order" with imperialism as "coercive world order" and he states:

"....Federalism should not be considered a term for a static pattern designating a particular and precisely fixed division of powers between governmental levels. Instead, "federalism" seems the most suitable term by which to designate the process of federalizing a political community, that is to say the process by which a number of separate political organizations, be they states or any other kind of association, enter into arrangements for working out solutions, adopting joint policies and making joint decisions on joint problems. Conversely, federalism is the process by which a hitherto unitary political community, as it becomes differentiated into a number of separate and distinct political communities, achieves a new organization in which the differentiated communities, now separately organized, become capable of working out separately and on their own problems they no longer have in common. It is not only a matter of decision-making, but of the entire range of power and its exercise..... The federalizing process accompanies, so to speak, the communal development as its organizational counterpart. If values, interests and beliefs exhibit a stable and structural pattern in which the commonly shared values, interests and beliefs are counter-balanced by values, interests and beliefs that are not shared, though territorially distributed, then a federal development becomes possible." 3

Friedrich regards as an essential element of federalism the constitutional protection of each level of the political order against the other and his definition thus excludes instances of international relations or senior-local authority relations where such legal protection does not exist. A recent book on the American federal union concludes with the most useful definition of federalism from the public-policy-process viewpoint we have found:

Federalism is a system of government in which central and regional authorities are linked in a mutually interdependent political relationship; in this system a balance is maintained such that neither level of government becomes dominant







to the extent that it can dictate the decisions of the other, but each can influence, bargain with, and persuade the other. Usually, but not necessarily, this system will be related to a constitutional structure establishing an independent legal existence for both central and regional governments, and providing that neither shall be legally subordinate to the other. The functions of government will be distributed between these levels (exclusively, competitively, or co-operatively), initially perhaps by a constitutional document, but thereafter by a political process, involving where appropriate the judiciary; in this process the political interdependence of the two levels of government is of the first importance in order to prevent one level absorbing all effective decision-making power. 4

Established federal systems are characterized by the growing importance of the relations between the executives of the central and regional governments. Several inter-related influences contribute to the development of what might be called "executive federalism".

1. The constitutions of most federations have proved somewhat resistant to evolution through amendment or changing patterns of judicial review. Amending procedures in all established federal systems are inflexible, i.e. small minorities can block attempted changes in the text of the constitution. For several reasons the judiciary in several federations have come to play a more restricted role than previously in maintaining the federal balance. Thus political and administrative processes have become the chief instruments of change.

2. The increasing interdependence of modern social and economic life makes it impossible for the regional governments to carry out their responsibilities in the absence of appropriate action by the other regional jurisdictions







and the federal authorities. Maurice Lamontagne wrote of Canada a decade ago "...l'attribution de responsabilites exclusives aux differents gouvernements n'est pas possible parce que la politique economique et sociale est devenues quasi indivisible." <sup>5</sup>

3. Nationalist and egalitarian sentiments focused on the federations as such have propelled the federal government into collaborative arrangements to establish country-wide standards in public services regarded as being within the social minimum. Under the constitutions of most federations the regional authorities are assigned the primary responsibilities for health, welfare and education. The only way that this circumstance can be reconciled with egalitarianism is through intergovernmental collaboration.

4. Contemporary rates of taxation and the deliberate use of fiscal policy to provide for economic stability and growth have created circumstances in which particular tax and spending policies of one level have consequences for the other. The central and regional jurisdictions increasingly compete for tax sources. Federal governments like those of other nations have assumed responsibilities for over-all economic direction and if these responsibilities are to be discharged effectively appropriate actions of the regional and local authorities are necessary. In Canada as in other federal systems the fiscal relations between the central and regional governments have become increasingly complex and increasingly crucial to the stability of the federation.







5. The widening scope of public activity gives rise to an increasing number of situations where federal and regional objectives must be co-ordinated if intolerable stresses on the system are not to result. The old classical federalism in which each level carried out the functions assigned to it by the constitution in relative isolation from the other had some relevance to a period when governmental responsibilities were limited in scope and importance. Contemporary circumstances are quite otherwise.

The relations between the executives of the federal and the state or provincial governments are in most federations extraordinarily complex. Many of these interactions are of an informal and ad hoc nature. Furthermore the significant decision-making units in respect to many matters are not the federal and regional administrations as such but rather functional groups which are constituted across jurisdictional lines. Edward W. Weidner after several intensive studies of federal-state relations in the American system wrote about functionalism in this way:

" It is a thesis of the present discussion that in the federal system of the United States there are relatively few direct clashes or compromises between State and national governments on large issues of domestic policy. Furthermore, in the administrative sphere positive co-operation is the pattern rather than aloofness or conflict. The disagreements and conflicts which do arise and that may be encouraged by federalism's structural features are not basically clashes between state and national governments. Instead they are clashes between much smaller groups of







people and the opposing groups are concentrated within a single governmental level as often as not." <sup>6</sup>

Similarly, Donald V. Smiley found that in the administration of federal conditional grants to the Canadian provinces the attitudes and interests of programme specialists and financial officials were very different and that conflicts related to the grant-in-aid arrangements characteristically saw division along these lines rather than between federal and provincial governments as such. <sup>7</sup>

Although the analysis of public policy processes seems to us a useful focus for studying contemporary federalism, it is a partial approach. It concentrates on a relatively small number of executive officials who devise and implement public policy. However, political scientists have come increasingly to question the validity of studying the law and practices of government in isolation from the attitudes, social groupings, economic structures and so on which condition and are conditioned by governmental activity -- there is an increasing stress on what has come to be called the "ecology" of government. <sup>8</sup> This study examines the circumstances of policy-making and implementation in the Canadian federal system. Another kind of investigation, one which would be much more difficult to carry through, would concentrate on the sociology and politics of Canadian federalism. An American scholar has asserted "The essence of federalism lies not in the institutional or constitutional structure but in the country itself. Federal government is a device by which the federal qualities of a society are articulated and protected." <sup>9</sup>







In all developed societies there are groups who strive to secure governmental action they perceive to be favourable to their aspirations and interests. Federal governments can be sustained only in societies which are themselves federal in the sense that people in different areas believe that in respect to a number of important matters their interests are specific to these areas. If, on the other hand, the major incidences of political differentiation relate to class, religious, occupational or other groupings not territorially located federalism has little relevance. In his study of four Latin-American republics with federal constitutions (Mexico, Argentina, Brazil and Venezuela) William S. Stokes concludes that certain economic and cultural features make federalism as government in the usual sense impractical "in these countries".

"Most Latin Americans are conditioned by their historical traditions and social and economic institutions to understand and accept concentrated, centralized power, usually of a highly personalized sort. The strong, frequently exalted role of the father in the family, the importance of the elite in the class system, the honor, dignity, power and influence of the doctor from the aula (lecture hall), the significance of centralized leadership in the Church, the paramountcy of the 'general' in politics, and the position of the public and private monopolist in the economic system. These characteristics of Hispanic culture all suggest powerful, centralized government. In addition, the political experience and traditions of hundreds of years was with a powerful monarchy operating by means of a centralized administrative hierarchy. The modern constitutions all provide for 'interventionist' states." 10

Federal governmental institutions to be stable must correspond with particular kinds of social structures







and cultural predispositions so that regionally-based particularisms can find an outlet while making possible common action in respect to matters where these particularisms are of less importance.

The sociological and governmental aspects of federalism are thus intimately related. When relatively stable federal systems have been established some groups come to press their claims primarily through the federal government and others through the states or provinces. In the United States, for example, those hostile to the public regulation of business usually favour "states'"rights<sup>11</sup> while those striving for civil rights for the negro look to action from the federal legislature, executive and judiciary. If most of the influential groups in any federation came to look exclusively to either one level of government or the other it is likely that federalism could not long survive, although the federal rituals might long remain. But once the division of legislative and executive powers between the central and regional governments is established, there are influences at work to sustain the federal quality of the society itself and they create new country-wide and regional centres of influence where none existed before. The Report of the Committee on Manitoba's Economic Future published in 1963 stated:

" The Province of Manitoba is more than a political division of the nation. During the more than 90 years since its establishment a distinctive social and economic entity has been developed within the essentially artificial







political boundaries. When the Province joined the Canadian Confederation, 'Manitoba' was not much more than a block of land surrounded by lines on the map. In the intervening years, however, it has become an organic unit, trading patterns have developed, transportation systems have been established, educational and administrative systems have been organized, and all the other social, economic and political institutions of a modern society have evolved. The people of Manitoba, now, therefore, are responsible for dealing with many of their own problems....."

The establishment of important centres of political power thus provides the setting for other centres of influence within the same territorial limits and social and governmental federalism reinforce one another. Conversely, a federation under great stress may be expected to feature tensions, on both its public and private institutions.

The drives for provincial autonomy in contemporary Quebec have corresponded with influences toward a greater measure of independence for the French-Canadian elements in non-governmental organizations and these influences in some cases (such as those involving university students, the Junior Chambers of Commerce and the municipal associations) have culminated in the withdrawal of the French-speaking

<sup>12</sup> members. In the period immediately preceding the outbreak of the American Civil War many formerly national organizations such as churches and political parties separated into Northern and Southern components.

There has been almost no systematic examination of the kinds and distributions of popular attitudes which are compatible with the maintenance of federalism in government. Some years ago J. A. Corry spoke of the "stresses and conflicts" in the Canadian federal system "which need







to be negotiated and compromised (by the governments) in ad hoc arrangements, particularly where the electorates to not seem disposed to say clearly whether they are federal or unitary in spirit".<sup>13</sup> Does contemporary co-operative federalism require widespread popular attitudes which are pragmatic and equivocal as to the appropriate level of government for carrying out particular public responsibilities? It seems likely that if the prevailing attitudes came to be that one or the other level was more legitimate in respect to all the public activities believed important the federation could not long survive. If there were a consensus throughout the country about this matter the system might either in a peaceful and orderly way disintegrate or evolve into a unitary state. It is more likely, however, that no such agreement will be established and if the conflicts about legitimacy are pushed to the limits we have a "recipe for civil war".

It is common to assign the political parties a central role in the maintenance of federal systems. The usual analysis in Canada and the United States has been that these unions can be sustained only if there are country-wide parties drawing strength from all regions.<sup>14</sup> In examining eight established federations the American political scientist William H. Riker addresses himself to the question "what maintains federalism?" and systematically dismisses the arguments that the crucial elements are the sharing of administrative responsibilities,







dual citizen loyalties or the existence of dissident  
 15 provincial patriotism. He concludes:

" Whatever the general social conditions, if any, that sustain the federal bargain, there is one institutional condition that controls the nature of the bargain in all the instances here examined and in all the others with which I am familiar. This is the structure of the party system which may be regarded as the main variable intervening between the background social conditions and the specific nature of the federal bargain." 16

According to Riker's analysis, a federation is centralized or "peripheralized" to the degree that "the parties organized to operate the central government control the parties organized to operate the  
 17 constituent governments". Although federal-provincial party relationships have received little  
 18 systematic attention in Canada, our tentative conclusion is that the federal and provincial executives working in isolation or in collaboration have assumed the crucial role in effecting changes in the political system. On the other hand, as we point out in the last Chapter of the study, the influences toward federal-provincial integration to which the executives are subjected are not reinforced by corresponding pressures on the party organizations and because of this it may be that co-operative federalism will fail.

The preceding brief analysis of the sociology and politics of federalism are meant to suggest only that the public policy approach is a limited one and







that "executive federalism" cannot realistically be considered in isolation from the other influences impinging on the maintenance of federal institutions. The underlying assumptions of this study are that federal systems, like other institutions, must have the capacity to adapt to changing circumstances if they are to survive and that it is more doubtful than most of us would have believed a few years ago that the Canadian federation can develop the necessary resources of adaptability. For analytical purposes, we make a distinction between two kinds of processes of evolution. The first we call "devices of adjustment", the procedures by which the respective powers, resources and responsibilities assigned to the federal and provincial governments by the original constitution are dynamically redelineated as new circumstances arise. The second category of processes is named "devices of articulation", the procedures through which the activities of the two levels are related to one another by their respective executives. It seems reasonable to believe that a federal system could not under modern circumstances survive unless it developed resources of flexibility through both kinds of devices. We have only crudest of measures to determine whether a federation is responding effectively to the demands made upon it. In a negative sense one might judge that the resources of adaptability in a particular federal system were being strained if any or all of the following







circumstances existed:

First, none of the political parties was able to draw significant strength from all regions of the country. In any federation much of the political conflict at the federal level will revolve about divergent regional interests. However, when at least one of the parties comprehends these interests tolerable compromises can ordinarily be worked out through the procedures of intra-party accommodation. When no such inclusive party exists these procedures cannot be used for this purpose.

Second, there are widespread public attitudes which attribute the deprivations that people feel strongly about<sup>to</sup>/the inherent nature of federal institutions.

Federations, like other human institutions, can survive only if people regard them as legitimate.

Third, most of the politically influential elements of the country come to seek their objectives exclusively or almost exclusively through one or the other levels of government. Such a situation attenuates the tension between country-wide and regional interests necessary to the maintenance of federalism.







# NOTES

- 1 Federal Government, 4th Edition, Oxford Paperbooks, 1963, Chapter II.
  - 2 ibid, p. 20.
- Friedrich
- 3 Man and His Government, McGraw-Hill, New York, 1963, pp.594-595.
- Vile
- 4 M. J. C. Vile, The Structure of American Federalism, Oxford, 1961, p.199
  5. Le Fédéralisme Canadien, Laval, 1954, p. 245.
  - 6 "Decision-Making in a Federal System" in Federalism, Mature and Emergent Arthur W. Macmahon, Editor, New York, 1955, p. 363.
  - 7 Conditional Grants and Canadian Federalism, Canadian Tax Paper No. 32, Canadian Tax Foundation, Toronto, 1963, pp. 37-42.
  - 8 One of the most distinguished efforts in this direction is the Little, Brown Series in Comparative Politics under the Editorship of Gabriel A. Almond, James S. Coleman and Lucian W. Pope. See particularly The Civic Culture by Gabriel A. Almond and Sidney Verba, Princeton University Press, 1963, and the abridgment under the same name in The Little, Brown Series, 1965.
  - 9 William S. Livingston, Federalism and Constitutional Change, Oxford, the Clarendon Press, 1956, p. 2.
  - 10 "The Centralized Federal Republics of Latin America" in Essays on Federalism, George C. S. Benson, Martin Diamond et al, Institute for Studies in Federalism, Claremont, California, 1961, p. 93.
  - 11 Winnipeg, III, 3-1.
  - 12 Professors Vincent Lemieux and John Meisel are undertaking a study of the bicultural aspects of certain non-governmental associations in Canada for the Royal Commission on Bilingualism and Biculturalism.
- Corry
- 13 "Constitutional Trends and Federalism" in Evolving Canadian Federalism, A. R. M. Lower, F. R. Scott et al, Duke University Press, 1958, p. 141.
  - 14 See, for example, Herbert Agar, The Price of Union, Boston, 1950, for a presentation of this hypothesis as it relates to the United States. In Canada Frank Underhill has been the most persuasive apologist for the bi-national parties. See In Search of Canadian Liberalism, Toronto, 1960, and The Image of Confederation, The Massey Lectures, 1963, Canadian Broadcasting Corporation, Toronto, 1964.
  - 15 Federalism: Origin, Operation, Significance, Little, Brown, Boston, 1964, particularly pp 135-136.
  - 16 p. 136.
  - 17 p. 129.







## NOTES (continued)

8 For one of the few systematic efforts in this direction see E. R. Black, Federal Strains within a Canadian Party, Paper presented to the Canadian Political Science Association, Charlottetown, 1964. (mimeo).







## CHAPTER 2

Post War Canadian Federalism. The "New National Policy".

Between about the middle of 1942 and the end of the European War the Government of Canada devised and committed itself to an inter-related group of programmes and policies for domestic reconstruction in the post-war period. These initiatives were so comprehensive in scope that, taken together, they can reasonably be regarded as a "New National Policy" comparable to the original National Policy of 1878.

By the beginning of the First World War the social and economic objectives of the Confederation settlement and the National Policy had in the main been achieved - the West had been acquired by the Dominion and settled, the country had been linked by transcontinental railroads, a thriving and highly-protected commercial and manufacturing sector had been established. In spite of the controversies surrounding the Ontario schools and military conscription issues, the War committed most Canadians to an over-riding objective. The return of peace, however, left the country without important purposes to be realized through federal leadership and in the 1920s provincial and regional interests were more dominant than at any time since Confederation. The decade of the Great Depression failed to produce a commitment to comprehensive national reforms and in the desperate circumstances of the time the reactions of the Dominion and the provinces were haphazard, hesitant







and confused.

From the early days of the Second World War until its conclusion, elected and appointed officials of the federal government devoted a considerable amount of time and energy to planning for the post-war domestic reconstruction. Those involved were determined that the social and economic conditions of the Depression should not recur and a conjuncture of events and currents of thought and sentiment made it seem both possible and desirable to commit the Canadian people to a set of co-ordinated national objectives in the post-war period. The experience of the war had revealed the productive potentials of the Canadian economy under federal direction. The perspectives of Keynesian economic analysis suggested to the senior officials of the civil service that the federal government might move effectively to ensure high and stable levels of employment and income within the framework of the private enterprise system. Humanitarian sentiments fostered by the deprivations of depression and war combined with seemed to be the economic need of guaranteeing high levels of consumption expenditures in the post-war period to make more ambitious schemes of income-maintenance than had previously been seriously considered in Canada appear both feasible and appropriate. The successes of the War against the background of the obvious failures of the Depression had made aggressive federal leadership







seem the necessary precondition of progress and the balance of bureaucratic vigor and competence was heavily in favor of the federal government as against the provinces. These and other factors were favourable to ambitious federal plans for domestic reform. This planning was intensified as the European conflict reached its conclusion and culminated in several important pieces of legislation enacted in the Parliamentary Session of 1944, The White Paper on Employment and Income issued by the Minister of Reconstruction in April 1945 and the so-called "Green Book" proposals presented to the provinces by the federal government at the opening of the Conference on Reconstruction in May 1945.

Federal activities in post-war planning prior to the 1944 Session need be mentioned only briefly. On December 9, 1939 a Cabinet committee on re-establishment and demobilization was created and its terms of reference were extended to include all phases of reconstruction by Orders-in-Council in February and October 1941. A House of Commons Committee on Reconstruction and Re-establishment was established in 1942 and continued its work through the two subsequent Sessions. In 1943 a Senate Committee on economic re-establishment and social security was set up and there was also a special House of Commons on Social Security in 1943 and 1944. From 1941 onward national health insurance was under discussion by the







Dominion Council of Health and in 1944 an Advisory Committee on this matter which had been set up by the government presented a report including a draft bill for a country-wide plan of health insurance. These and other planning activities began to take more concrete form in several enactments sponsored by the government in the 1944 Session of Parliament.

### The Session of 1944-45

The Session of Parliament which began on January 27, 1944 and was prorogued on January 31, 1945 saw the enactment of several important pieces of legislation providing for post-war domestic reconstruction. The Speech from the Throne asserted "while the post-war objectives of our external policy is world security and general prosperity, the post-war objective of our domestic policy is social security and human welfare".<sup>2</sup>

Thus:

"...plans for the establishment of a national minimum of social security and human welfare should be advanced as rapidly as possible. Such a national minimum contemplates useful employment for all who are willing to work, standards of nutrition and housing adequate to ensure the health of the whole population, and social insurance against privation resulting from unemployment, from accident, from the death of the bread-winner, from ill-health and from old age." <sup>3</sup>

Such a programme would require planning which was defined in terms of the three inter-related requirements of the rehabilitation into civilian life of former members of the Armed Forces, the reconversion of the economy to peace-time conditions so that there would be employment







for all those able and willing to work and the provision of various kinds of social insurance against major hazards. More specifically, the Speech from the Throne promised federal leadership in establishing a comprehensive system of social security and health insurance to be worked out in collaboration with the provinces, an integrated system for veterans' rehabilitation and the extension of housing legislation. The Speech committed the government to creating three new Departments to carry out these new federal responsibilities - Departments of Reconstruction, of Veterans' Affairs and of Health and Welfare.

The major legislation related to post-war domestic reconstruction enacted in the 1944-45 Session may be outlined briefly:

1. The National Housing Act provided for both federal loans and federal guarantees of other loans for those wishing to build residences for their own use, guaranteed loans for rental housing and for home improvement and extension, grants to municipalities to acquire land for slum clearance and federal initiative in stimulating research in housing and community planning

2. The Family Allowance Act provided for allowances for the children of residents after July 1, 1945 at rates ranging from \$5.00 for a child under six years to \$8.00 for children between their thirteenth and sixteenth birthdays.

3. Under the Agricultural Prices Support Act a







federal agency was established with wide powers to prescribe, with the approval of the Governor-in-Council, the prices which the government would pay for agricultural products and to dispose of the products so acquired. Other legislation made similar provision for fisheries products.

4. An Industrial Development Bank with an authorized capital of \$25/<sup>millions</sup> to be subscribed by the Bank of Canada, was established for the purpose of providing funds for enterprises who would otherwise have had trouble securing capital.

5. Under the Farm Improvement Loans Act provision was made for federal guarantees of intermediate-period and short-term loans for agricultural improvement.

6. An Air Transport Board was established with regulatory powers over civil aviation.

7. A Department of Reconstruction was established with wide powers of co-ordination to ensure the smooth transition to peace-time circumstances.

8. A Department of National Health and Welfare matters was created to discharge the responsibilities of the federal government in these matters.

9. A Department of Veterans' Affairs was created.

#### The White Paper on Employment and Income

The White Paper on Employment and Income presented to Parliament by the Minister of Reconstruction in April 1945<sup>4</sup> is the most coherent and closely reasoned statement of the New National Policy made by the government.







The White Paper dealt very explicitly with what it called "the initial period of Reconstruction" defined as the time between the ending of the European War and the cessation of hostilities in the Pacific, and much more broadly with the post-war period. It is, however, these latter perspectives which are our concern here.

The White Paper committed the federal government to ensuring a high and stable level of employment and income after the war. This aim was not only to "pervade" all federal economic policies but "must be wholeheartedly accepted by all economic groups and organizations as a great national objective, transcending in importance all sectional and group interests".<sup>5</sup> The White Paper proceeded straightforwardly in terms of the Keynesian analysis which postulated that remunerative employment and income are generated by the expenditures made on exports, on private investment, on consumption and on public investment. Specific suggestions were made as to how the government would act so as to ensure adequate levels of expenditure in each of these categories after the Pacific War ended.

#### 1. Export Trade.

The White Paper looked to an expansion of world trade so that Canada and other countries might increase their exports. This result~~y~~ould be pursued by the government through international action toward







"the reduction and restriction of trade barriers, especially trade barriers of an arbitrary and discriminatory type". The expansion of multilateral trade also required the comparative stability of exchange rates and a cessation of the competitive depreciation of rates which had so aggravated the world economic situation in the 1930s and the government pledged itself to co-operate with other nations to this end.

## 2. Private Investment.

The White Paper committed the government to policies making for a high level of private investment in the post-war period. Taxation which in war-time was designed to discourage such investment for other than war purposes was to be reduced and in particular government policy was to "minimize taxation which contributes to a higher level of production costs". A monetary policy encouraging low interest rates and "the investment of funds in productive capital contributing to employment" were to be undertaken. The Industrial Development Bank created in 1944 would provide credit for the establishment and expansion of enterprises which had previously been unable to get adequate financing from private institutions and under the Farm Improvement Loans Act government-guaranteed bank loans would be available to meet the needs of farmers for capital. The provisions of the National Housing Act of 1944 would provide for various kinds of federal assistance to stimulate residential construction and slum clearance.







### 3. Consumption Expenditures.

The White Paper committed the government to ensuring a high level of consumption-expenditures through other measures to encourage employment and through various social security plans, some to be undertaken exclusively under federal control and others in collaboration with the provinces.

### 4. Public Investment.

Although the White Paper recognized that the "deliberate use of public investment expenditures as a permanent instrument in employment policy" had never been undertaken anywhere in the world it was suggested that progress might be made along two lines:

First, the federal government would itself undertake to plan in advance a "shelf" of "desirable Dominion projects" which would be undertaken when employment conditions made this desirable. The federal authorities would encourage the provinces and municipalities to participate in similar kinds of advance planning and to co-operate in the counter-cyclical timing of capital expenditures.

Second, the federal government in collaboration with the provinces would implement a new Dominion policy of expenditure on the development and conservation of natural resources with special attention to those expenditures which might be varied in accord with income and employment levels.

In the field of public expenditures, the White







Paper also committed the government to the development of the natural resources of the Yukon and the Northwest Territories and to a "planned pattern" for the development of civil aviation.

In lucid language the White Paper explained the general economic rationale of the New National Policy and the kinds of policies the federal government had accepted to attain and ensure high and stable levels of income and employment. With the ending of the War in the Pacific being imminent the government turned to making its projected policies more detailed and explicit and these were presented to the provincial leaders at the opening plenary sessions of the Conference on Reconstruction on August 6-7, 1945.

#### The Dominion-Provincial Conference on Reconstruction

At the Conference on Reconstruction convened by the federal government in the late summer of 1945 the directions suggested by the White Paper on Employment and Income were embodied in a group of inter-related proposals to the provincial authorities.<sup>6</sup> Taken together, what came to be called the "Green Book proposals" looked forward to a more fundamental redelineation of the functional responsibilities, revenues and revenue sources between the federal and provincial governments than had ever been seriously considered before.

#### Fiscal Arrangements.

Under the federal plan the provinces would forego levying personal and corporate income taxes and







succession duties, apart from taxes on profits from logging and mining operations, and would receive in compensation annual unconditional subsidies from the federal government. These subsidies would be \$12. per capita, decreased or increased in proportion to the value of the gross National Product as compared with 1941 but subject to an irreducible minimum equal to \$12. per capita of 1941 population.

#### Public Health.

The federal government offered to share with the provinces the costs of a comprehensive health insurance plan to be implemented in stages and when fully developed to include general practitioner services, hospital care, nursing care, specialized medical and nursing care, dental services, laboratory and X-ray services and pharmaceutical drugs. The federal government would pay to each participating province a basic grant of one-fifth of the estimated costs of each class of service and one-half of the actual costs of providing each class of service with the limits that the total federal contribution should not exceed a schedule for each service adopted by the federal government or a maximum of \$12.96 per capita when the complete plan was developed.

Along with its proposed contributions to health insurance, the federal government offered to give financial assistance to provincial health services in two forms:







(a) A group of eight specific health grants for specific purposes would be paid including those relating to professional training, research, mental illness, tuberculosis, venereal disease and crippled children.

(b) In those provinces entering the health insurance scheme the federal government would assist in hospital construction by loaning money to the provinces and/or local authorities at a rate "equal to, or only slightly above the costs of such loans to the Dominion" and that the interest and amortization on such loans might be paid from the proceeds of the Health Insurance or other specific federal health grants.

#### Social Security.

The federal government made four major proposals in the field of social security:

(a) The Dominion would assume the exclusive responsibility of paying a \$30. per month pension to all residents of Canada 70 years of age and over without a means test.

(b) The Dominion would pay to the provinces up to 50 per cent of the cost of old age assistance pensions to a maximum of \$30. per month for persons of 65 to 69 years of age who met the requirements of provincially-administered means tests.

(c) The federal government would assume complete responsibility for unemployment assistance to persons who were employable but who were unable to obtain work







and whose benefits under the existing unemployment insurance scheme were exhausted.

(d) The federal unemployment insurance scheme would be extended to cover eventually all employed persons.

#### Natural Resources Development and Public Investment

The Green Book proposals suggested the necessity of a very large amount of public investment in the conservation and development of agricultural, forestry, mining and fishing resources. The government was willing not only to expand its activities in these fields within its own jurisdiction but also to enter into specific agreements to assist the provinces in such matters as the conservation of agricultural and forestry resources, the construction of a trans-Canada highway and the building of roads and airports facilitating resource development.

The federal government proposed that the provinces and municipalities co-operate in the timing of their public works for counter-cyclical reasons. Under the federal proposal these governments would be given planning grants to survey their needs in this respect and would receive up to 20 per cent of the costs of postponable projects if these were executed in a period designated by the Dominion authority.

Before the Conference adjourned on August 10 it was evident that the leaders of the Quebec, Ontario and Alberta governments took issue with the federal vision of the post-war future on grounds of fundamental constitutional principle. Prime Minister







Drew of Ontario speaking before the detailed federal proposals were presented to the Conference spoke of the necessity of provincial fiscal autonomy and of a clear-cut "redefinition and reallocation" of both taxing and administrative powers between the two levels of government - a general point of view quite incompatible with the perspectives of the New National Policy. The later debates of the plenary Sessions of the Conference on April 29-May 3, 1946 were almost entirely given over to discussions of the payments to be received by the provinces for "renting" the personal income, corporation tax and succession duty fields to the Dominion rather than the much broader issues raised by the Green Book proposals. In the meantime the federal government had agreed to modify its preliminary financial offers in several respects, among which were the following:

1. The tax rental payments for exclusive access to the direct tax fields would be \$15.00 per capita per year.

2. Provincial taxes on logging or mining operations would be recognized as deductible expenses for federal income tax purposes.

3. The Dominion agreed for the duration of the agreement not to raise its special excise taxes on gasoline, amusements and pari-mutuel betting except in the event of a national emergency.

4. The federal government would refund to the provinces half of the net corporate income tax collected







from companies generating or distributing electricity, gas or steam.

At the end of the Conference it was apparent that the federal authorities were unwilling to accede to the heavy fiscal demands of Ontario. At no time did the government of Quebec state with any precision the circumstances under which it would be prepared to rent the three tax fields.

### The Rationale of the New National Policy

The post-war reconstruction policies of the federal government contained four inter-related elements:

First, the federal authorities would assume the primary responsibility of ensuring high and stable levels of employment and income. At the Conference on Reconstruction the Minister of Finance asserted that this responsibility would be discharged:

"....(1) by achieving the best possible agreements with other United Nations in the field of economic relations, agreements which would encourage and permit the expansion of world trade and full use of our resources; (2) by pursuing fiscal and other policies which will create favourable conditions within which the initiative, experience and resourcefulness of private business can contribute to the expansion of business and employment; (3) by so managing its public investment expenditures and making it financially advantageous to provincial and municipal governments so to manage theirs, that they will contribute to the stability and not to the instability of employment; further to direct these expenditures to the development and conservation of our natural resources, improving thereby the opportunities of the Canadian people and the financial position of the provincial governments who administer them; (4) by maintaining and stabilizing by a comprehensive system of old age security, incomes which are largely spent on







consumption and by contributing thereby to the health, welfare and productive capacity of the Canadian people and to their employment." 7

Second, the federal government would have exclusive access to personal income taxes, corporate taxes and succession duties. The Minister of Finance put it in these terms:

"The continuing expenditures arising out of the war will be heavy. National progress and the fulfillment of necessary international commitments both require the Dominion Government to undertake a large programme of national development and national welfare. It will clearly need to make full use of its power to impose national taxes on personal incomes, corporations and estates. Its revenue needs will be so great that the duplication of these taxes by other governments would seriously restrict enterprise and output and would jeopardize Canada's employment programme." 8

Exclusive access to these tax fields was necessary, argued the Minister, not only because of the expected high levels of federal expenditures but also in the light of the demands of counter-cyclical fiscal policy. The Minister asserted:

"All taxes affect the volume of spending, but income and corporation tax rates, and changes in these rates, also have a vital bearing upon the incentive to produce and to undertake capital expansion. It is therefore important that these taxes be levied exclusively by the Dominion Government. It is the only government which, because it can budget for the whole business cycle, is able to set rates in such a way as to contribute to a high and stable level of employment." 9

Further "Exclusive jurisdiction over taxes on incomes, corporations and estates is also necessary in order to protect Canadian interests abroad. With divided authority it is difficult to conclude reciprocal







agreements with other countries which will prevent double taxation of Canadian incomes and estates." 10

Third, the federal government would assume the initiative in the establishment of a comprehensive system of social security, including health insurance and income-maintenance plans for the aged and unemployed and family allowances. The Minister of National Health and Welfare summarized the justifications for these measures:

"A nationally based and nation-wide social security system can strengthen true Canadian unity. It is the practical expression of our common interest in protecting the individual against economic hazards beyond his control.

The government believes that the social security proposals which it is putting before the Conference would make a threefold contribution. They would provide a network of protection for the Canadian people that justifies itself on social and humanitarian grounds. They would provide an important degree of protection to buttress the nation's economy as a whole in times of stress and strain. Less tangible, perhaps, but in some ways most important of all, they would make a vital contribution to the development of our concept of Canadian citizenship and to the forging of lasting bonds of Canadian unity." 11

Fourth, the federal government would assume heavier responsibilities than before in ensuring the adequacy and stability of provincial revenues by annual per capita grants related to the level of the Gross National Product. By making the payment of these grants conditional on the provinces "renting" the personal income and corporation tax and succession duty fields, the federal authorities of necessity







decided to forego measures of inter-provincial equalization as recommended by the Rowell-Sirois Commission and embodied in the fiscal arrangements prevailing from 1957 onward, conditions which would attract the most prosperous provinces to remain out of these fields would almost inevitably frustrate such equalization.

The New National Policy assigned the provinces a subordinate role in the Canadian federal system. The rationale of the proposals was to mobilize the efforts of Canadians in the fulfilment of well-defined social and economic objectives and, as war-time experience seemed to demonstrate, this mobilization could come about only through the dominance of the federal authorities. Prime Minister King expressed the prevailing mood in his opening speech to the Reconstruction Conference:

"The lessons of war have taught us the vital importance of co-operation in an effort to reach a common goal. Without unity there is frustration. Now that we are coming face to face with the problems of the post-war years, the need for unity and co-operation is not less than it has been, from some points of view it is greater. The enemies we shall have to overcome will be on our own Canadian soil. They will make their presence known in the guise of sickness, unemployment and want. It is to plan for a unified campaign in Canada against these enemies of progress that we have come together at this time....." 12

To realize these objectives it was proposed that the provinces go into what the Prime Minister called a "partnership" with the Dominion. However, the terms of this new relationship and the design of the post-war future were to be formulated by the federal







authorities. Although provincial representatives had participated in the Advisory Committee on Health Insurance and there had been some consultation with the provinces by the House of Commons Committee on Reconstruction, the comprehensive and detailed Green Book proposals were accepted as federal policy with little involvement of the provincial administrations. These proposals were made available to the press some hours before the provincial leaders had seen them and the casual way in which the Prime Minister dealt with this inadvertent slight to the provinces reveals the dominant position the federal government assumed in defining the situation and designing the shape of the post-war future. Between the opening of the Conference and its adjournment sine die nearly nine months later the federal government made concessions to the provinces in the direction of increased per capita grants and the offer to withdraw from certain tax fields. However, the Green Book proposals were presented as a "package", and at the end of the Conference the federal authorities had proved unwilling to accept any essential modification in these proposals.

The federal government believed that the New National Policy could be implemented without explicit constitutional changes. According to the new directions, the exercise of the federal spending power would permit the federal authorities to assume the role of leadership and co-ordination in respect







to many matters within provincial legislative jurisdiction. It was believed possible that the federal government could obtain exclusive access to the personal income, corporation and succession duty tax fields through agreements with the provinces. There was confidence in the possibilities of constructive federal-provincial collaboration in matters ranging from the anti-cyclical timing of public works to vocational training to the marketing of agricultural products. Thus in the major pronouncements of the New National Policy there was an implicit denial of what was axiomatic among those who favoured reform in the previous decade - that reform necessitated explicit constitutional changes enhancing the power of the federal government. In J. A. Corry's terms the post-war strategy was to "turn the flank of the constitutional issue",<sup>13</sup> the issue which had so pre-occupied those concerned with Canadian federalism in the 1930s. In the policy statements of federal officials in 1944 and 1945 the constitutional analysis was somewhat beclouded by the circumstances that under the British North America Act as judicially interpreted the federal government had the authority to exercise what were normally provincial powers in dealing with the economic and other dislocations resulting from the War, and it was clear that the government was determined to exercise these emergency powers after hostilities ceased and







to determine unilaterally the pace at which the peace-time division of legislative powers was to be restored. However, there can be no doubt that a basic assumption of the new version of Canadian federalism was that the dominance of the federal authorities could be perpetuated after the exercise of emergency powers had been ended.

A Digression: Federal Policies toward Culture.

The New National Policy as it emerged in 1944 and 1945 dealt almost exclusively with the economic shape of post-war Canada. However, in the early post-war years there grew up what one might reasonably call a parallel demand that the federal government should assume leadership in cultural development. There had been from time to time federal involvement in these matters. The National Museum had its origins in the pre-Confederation period, the Public Archives were established in 1872 and the National Gallery in 1880. A 1932 enactment of Parliament provided for the establishment of the Canadian Radio Broadcasting Commission with the dual responsibility of providing a national broadcasting service and of supervising all broadcasting in Canada. In the same year the National Research Council opened its first scientific laboratories. A National Film Board was established in 1939 and in 1941 was given the responsibility for the production and distribution of films. In spite of these and other federal initiatives, there was nothing







that could be called a co-ordinated federal policy toward cultural development.

The Royal Commission on National Development in the Arts, Letters and Sciences under the chairmanship of the Right Honourable Vincent Massey was appointed in April 1949 with broad responsibilities to report on radio and television broadcasting, the work of the various cultural agencies of the federal government, Canadian participation in international cultural activities and relationships between the government of Canada and its agencies with national voluntary groups in the cultural field. The Commission reported to the government in May 1951. Much of the spirit of the Report was contained in two sentences justifying federal involvement in what some persons had believed was the provincial field of education.

"All civilized societies strive for a common good, including not only material but intellectual and moral elements. If the federal government is to renounce its right to associate itself with other social groups, public and private, in the general education of Canadian citizens, it denies its intellectual and moral purpose, the complete conception of the common good is lost, and Canada, as such, becomes a materialistic society." 13

The Commission recommended the creation by the federal government of a "Council for the Arts, Letters, Humanities and Social Sciences" with responsibilities for a Canadian cultural policy and for fostering Canada's cultural relations abroad through U.N.E.S.C.O. and other international cultural agencies. It was proposed that through the proposed Council and otherwise the federal government should vastly increase its support for







various kinds of cultural activities. A national plan of undergraduate and graduate scholarships was also recommended along with annual federal contributions "to support the work of the universities on the basis of the population of each of the provinces of Canada".

Apart from the provision of university scholarships, most of the more important recommendations of what came to be called the "Massey Commission" have been implemented. Per capita grants of 50 cents to the universities were provided by Parliament in the 1951-52 fiscal year and this amount was progressively raised to the present level of \$2.00 per person in the provinces. The Canada Council with responsibilities very much like those envisaged by the Commission was established in 1957 and was given a \$50 million permanent endowment fund and a \$50 million University Capital Grants Fund. After the election of the Liberal government in 1963 more effective planning of federal cultural policies was provided for by grouping all federal agencies relating to these policies under the Secretary of State and the incumbent Minister has aggressively worked for more extensive and more co-ordinated federal efforts in this field.

#### The New National Policy 1946-1960

The adjournment of the Conference on Reconstruction sine die on May 3, 1946 demonstrated the impossibility of federal-provincial agreement on the







federal government's comprehensive and inter-related plans for creating a new pattern of financial and administrative relationships between the two levels. However, from the time the Conference ended onward the federal authorities sought and in many cases obtained provincial agreement on particular elements of the New National Policy. By this process of piecemeal adjustment over the subsequent years many of the objectives formulated by the federal government during the last years of the War had been wholly or partially reached.

#### Fiscal Arrangements.

After the end of the Conference on Reconstruction the basic federal strategy in fiscal matters, pursued with only partial success, was to go further than in the original proposals to design options meeting the needs of individual provinces in an attempt to persuade them to rent the three direct tax fields. Also, inter-provincial equalization through unconditional federal subsidies came to play an increasingly important role in federal-provincial financial relations.

#### Public Health.

In 1948 the federal government decided that the failure of the two levels to agree on a comprehensive reform of their financial and administrative relations should not be allowed to forestall federal leadership and financial assistance in improving particular public health activities within the jurisdiction of the







provinces. The National Health Programme of that year provided for ten separate but inter-related conditional grants, including one for hospital construction. As modified from time to time, these programmes have continued.

The Hospital Insurance and Diagnostic Services Act enacted by Parliament in 1957 provided for federal financial assistance to approved provincial hospital insurance plans. By January 1, 1961 all provinces were participating in this programme.

Social Security.

Under the Old Age Security Act which came into effect on January 1, 1952 the federal government assumed the total financial and administrative responsibility for paying pensions of \$40 per month to all persons in Canada aged 70 or over who had resided in the country for at least 20 years. This amount was progressively raised to \$75. in 1965.

In the period after 1946 there was a development of three "categorical" public assistance programmes in which the federal government shared with the provinces the costs of pensions to persons from 65-69 years of age, to the blind and to the "permanently and totally disabled" who met the requirements of provincially-administered means tests.

Under the Unemployment Assistance Act of 1955 the federal government moved part of the way toward accepting responsibility for the relief of







"unemployed employables" as recommended by the Green Book proposals. The Act provided that the federal authorities would reimburse the provinces to the extent of 50 per cent of the costs of general social assistance when the number of persons in receipt of such assistance exceeded .45 per cent of the provincial population. This "threshold" provision was removed by a 1957 amendment.

#### Natural Resource Development and Transportation

In the post-war years the federal government participated with the provinces in several ventures in the resource development and transportation fields. Among the most important of these were:

(a) The Canada Forestry Act of 1949 conferred on the Governor-in-Council the authority to enter into agreements with the provinces to assist them with various activities in the conservation and development of forest resources. Under these provisions agreements were concluded in respect to forest inventories, reforestation, forest fire protection and forest access roads. In 1962 these agreements for particular activities were replaced by a composite agreement covering wider forestry functions.

(b) In 1958 the federal government inaugurated a programme of financial assistance to the provinces in the construction of access roads to places where there were prospects for natural resource development.

(c) Under the Trans-Canada Highway Act of 1949, as







amended in 1956, the federal government contributed to the building of a paved two-lane highway from St. John's to Victoria.

(d) The Agricultural Rehabilitation and Rural Development Act of 1960-61 empowered the Minister of Agriculture to enter into agreements with the provinces to deal with the social and economic problems of unproductive agricultural areas.

As well as the general programmes mentioned above, the federal government in the post-war years participated in several schemes for the conservation and development of natural resources with particular provinces or groups of provinces - the Maritime Marshland Rehabilitation programme, the South Saskatchewan River Irrigation and Power Project, the St. Mary's Irrigation Project, agreements under the Atlantic Provinces Power Development Act and other ventures.

Although many of the major objectives of the New National Policy had been successfully pursued in the 15 years after the Second World War, others had not. After the expiration of the War-time Tax Agreements in 1947 the federal government at no time attained exclusive occupancy of the income tax and succession duty fields. No progress was made in evolving procedures for co-ordinating the capital expenditures of federal, provincial and municipal governments for counter-cyclical reasons.<sup>14</sup> The Green Book proposals for comprehensive pre-paid health insurance had been implemented only so far as care given in general







hospitals was concerned. The federal government had assumed only partial responsibility for social assistance to unemployed employables. In spite of these deficiencies, however, Canadian federalism had developed in the post-war years in directions not entirely unlike those projected by the formulators of the New National Policy.







NOTES

1. For the best available account of the development of Canadian federalism up to the Second World War see Report of the Royal Commission on Dominion-Provincial Relations, Ottawa, 1940, Book I. An abridgment of this analysis has appeared The Rowell-Sirois Report, Book I, edited by Donald V. Smiley, The Carleton Library No. 5, McClelland and Stewart, Toronto, 1963.
2. House of Commons Debates, January 27, 1944, p. 2.
3. ibid.
4. Employment and Income with Special Reference to the Initial Period of Reconstruction, Ottawa, 1945.
5. p. 23.
6. Dominion and Provincial Submissions and Plenary Conference Discussions, Dominion-Provincial Conference, 1945, Ottawa, 1946.
7. p. 118.
8. p. 113.
9. p. 114.
10. ibid.
11. Reconstruction Conference Proceedings, p. 35.
12. p. 7.
13. "Constitutional Trends and Federalism" opcit. p. 118.







### CHAPTER 3

#### Post-War Canadian Federalism. The Attenuation of Federal Dominance.

Between the latter half of the 1950s and the present the vigor and purpose which led to the formulation and the subsequent partial implementation of the New National Policy became weakened. A part of this can, of course, be explained in terms of the accomplishment of several of the objectives set forth by the federal government in 1944-45. However, other developments contributing to the attenuation of federal dominance have taken place and in respect to many important matters the provinces rather than the federal authorities now hold the initiatives and in other circumstances where previously the federal government had a wide range of freedom of action they must now seek the collaboration of the provinces. It is extraordinarily difficult to isolate the various influences working toward this shift in the federal balance and almost impossible to assess the relative importance of each in altering the respective roles of the federal government and the provinces. This Chapter attempts an explanation of the attenuation of federal dominance as a background to the subsequent analysis of the procedures by which the Canadian federal system has adjusted to the new circumstances.

#### Deficiencies in Federal Economic Policies.

The dominance of the federal government assumed







by those who formulated the New National Policy and established during the War and the subsequent decade could endure only so long as this dominance achieved results which met popular expectations. However, from the middle of the 1950s onward the country encountered a group of economic circumstances which were not dealt with effectively. The following tables illustrate these deficiencies in terms of economic growth and unemployment:

TABLE I

Index Numbers of per capita product at constant prices (1958 = 100) for Canada and selected countries.

	<u>1955</u>	<u>1956</u>	<u>1957</u>	<u>1958</u>	<u>1959</u>	<u>1960</u>	<u>1961</u>	<u>1962</u>
Canada	98	104	101	100	101	101	102	106
Denmark	92	94	93	100	106	112	118	122
France	90	95	93	100	102	103	112	116
West Germany	89	94	98	100	106	114	118	122
United Kingdom	97	99	100	100	103	107	109	109
United States	103	103	103	100	105	106	106	111
Japan	33	93	101	100	117	132	152	161

Source: United Nations, Department of Social and Economic Affairs, Statistical office, Statistical Year Book, 1963, New York, 1964, Table 170.







TABLE IIUnemployed in Relation to Total Civilian Labour Force  
in Canada in Selected Years

	<u>Unemployed</u> 000's	<u>Total Civil Labour Force</u> 000's	<u>Unemployed as Percentage of Civilian Labour Force</u>
1946	163	4,829	3.4
1948	114	4,988	2.3
1950	186	5,163	3.6
1952	155	5,324	2.9
1954	250	5,493	4.5
1956	197	5,782	3.4
1957	278	6,003	4.9
1958	432	6,127	7.1
1959	373	6,228	6.0
1960	448	6,403	7.0
1961	469	6,518	7.2
1962	391	6,608	6.0

Source: Canada Year Book, 1962 and 1963-64.

Not only was the general performance of the Canadian economy unsatisfactory but the deficiencies had a different incidence on the various segments of society. Particular industries remained depressed and pressures on prices in some sectors of the economy co-existed with unused capacity in others. The relative prosperity had by-passed some groups entirely. However, it was the differential regional impact of national policies which as in the past resulted in the most severe stresses on Canadian federalism. This aspect can best be illustrated by the regional rates of unemployment:







TABLE III

	<u>1950-54 average</u> <u>(percentages)</u>	<u>1955-59 average</u> <u>(percentages)</u>	<u>1960</u> <u>percentage</u>
Atlantic Provinces	5.8	8.8	10.6
Quebec	4.1	6.8	9.1
Ontario	2.4	3.8	5.4
Prairie Provinces	2.0	3.1	4.2
British Columbia	4.2	5.3	8.7

Source: Final Report of the Special Senate Committee on Manpower and Employment, Ottawa, Queen's Printer, 1961, p. 11.

The Keynesian economic analysis which in large measure provided the theoretical rationale of the New National Policy proceeded in terms of aggregates. Policies based on such assumptions tended to be insensitive to the incidence of public policy on particular industries and particular regions. Jacques Parizeau has thus evaluated federal economic policies in the post-war years as these grew out of the perspectives of the White Paper on Employment and Income:

"The framework of federal action upon the economy had to be quite general, or to put it differently, national in scope. The emphasis was on the variations in the total economic demand and large aggregates. Regional discrepancies in growth and structural bottlenecks were hardly considered and, in fact, at times federal authorities explicitly refused to consider them." <sup>1</sup>

In somewhat similar vein, Maurice Lamontagne in his paper to the Study Conference on National Problems in 1960 looked back over the previous economic policies of the federal authorities and suggested new directions for the future:

"Stagnation, inflation and unemployment have a very important regional and industrial incidence,







especially in Canada. Certain regions or industries grow rapidly while others are depressed. Certain industries may enjoy rising prices while others, at the same time, suffer from relatively low prices. Some industries or regions may experience heavy unemployment while others suffer from a scarcity of labour. Our national aggregates, such as the gross national product, the cost of living index and the national percentage of unemployment, are frequently the result of conflicting tendencies prevailing in different industries and different regions. It is always unrealistic and dangerous to interpret these national aggregates without taking their regional and industrial components into account. It is even more dangerous to attempt to solve such economic problems as unemployment as if they had the same causes and intensity throughout the country and as if they could be effectively met by the same policies in all industries and all regions." <sup>2</sup>

The relative insensitivity to regional and other particularistic demands encouraged by the prevailing economic assumptions of the federal government were reinforced by the workings of the Canadian political system. The incumbent federal administration had been in power since 1935, and particularly after the sweeping victory of the 1949 general election, appeared to face no effective challenge from any other political party. The civil service as it emerged from the War was in large part a creation of the Liberals and elected and appointed officials worked in close harmony. <sup>3</sup> In his analysis of the federal general election of 1957 John Meisel put forward "a hypothesis concerning the role of Canadian parties in reconciling the sometimes opposing pulls of our cabinet and federal systems". <sup>4</sup>

"Our cabinet system produces reasonably coherent national legislative programmes and facilitates their execution in a manner generally free from undue private or regional pressures. A party long in power (and, therefore, increasingly tempted by







delusions of infallibility) apparently comes more and more to think exclusively in national terms, particularly if most of the speculation and planning is done not by the party as such, but by Ottawa-based and Ottawa-minded ministers assisted by Ottawa-based and Ottawa-minded civil servants. When the regional interests ultimately come to find the national emphasis no longer tolerable, they turn to a party seemingly more receptive to provincial and regional pressure." 5

The deficiencies in the federal "aggregative" policies which had become apparent in the latter half of the 1950s had two inter-related results. First, the provinces were themselves propelled into a more interventionist role in economic matters than before. Second, the more selective federal economic policies required more provincial collaboration than did the New National Policy of the immediate post-war years.

The circumstances that we have described encouraged the provinces to engage in certain kinds of economic activities which they had not undertaken before or which they had undertaken in a less aggressive way. Jacques Parizeau asserted in 1964 that after 1957:

"In so far as federal policies had been much too broad in scope to deal properly with structural and regional problems, it was logical in the face of these new developments for the provinces to get involved much more deeply than they had ever been in their own economic policies, particularly in those policies directly related to the rate of growth and industrial expansion. Indeed a number of provinces still lack the personnel required for such responsibilities -- it could still be premature to think that all provincial politicians and civil servants are even roughly aware of these responsibilities. But a new approach has developed that is in remarkable contradiction to the centralist policies of the forties and early fifties. This new approach adopted by public authorities, who now have the means to carry out extensive programs,







can have a very sizable impact on the economy." <sup>6</sup>

The circumstances prevailing since the late 1950s have also had the result that the new kinds of economic measures undertaken by the federal government require a higher degree of provincial collaboration than did the previous ones. In his paper which we have quoted above Maurice Lamontagne called for the federal administration to develop more "selective policies" which would give "a regional and industrial formulation to our national policies". <sup>7</sup> In concrete terms, this has meant that when high rates of unemployment are attributed not only to deficiencies in aggregate demand but also to a relative lack of skill in the labour force effective action requires federal-provincial collaboration in expanding vocational training facilities. Under the present distribution of powers measures to mitigate the social and economic problems of marginal farming areas can be undertaken only through some such programme of inter-governmental co-operation as that provided for by the Agricultural Rehabilitation and Rural Development Act of 1960-61. Federal-provincial collaboration is necessary if effective measures are to be taken to stimulate industrial development in chronically depressed areas, including not only parts of the other provinces but the whole Atlantic region. When it was decided that the federal government should undertake programmes on behalf of those groups in society that had been by-passed by the general prosperity prevailing since the War it was







immediately evident that an effective war on poverty could be waged only with provincial co-operation. On the basis both of the differential impact of federal policies on regions, industries and occupational groups, and the increasing disposition of the provinces to implement their own measures for economic development and growth, it was almost inevitable that the more selective measures which came to be used by the federal authorities required for their success a higher degree of provincial co-operation than had previous federal policies.

#### New Directions in Quebec

The election of the Liberal government in Quebec in June 1960 coincided in time with other influences challenging federal dominance. For the first time since Confederation the administration of one of the larger provinces was committed to an explicit and comprehensive policy of social and economic reform through public action. Such a commitment in any one of the three or four largest of the provinces in population and resources would have offered a challenge to the federal power. This challenge from the "new Quebec" was of course more direct than otherwise because of the cultural groups dominant in the Quebec and federal governments respectively -- for the first time in Canadian history cultural and regional-economic cleavages have been compounded.

The Liberal manifesto issued before the 1960







election in Quebec committed the party to a group of important reforms among which were the following:

- the immediate adoption of a provincial hospital insurance scheme.
- the development of a provincial master-plan for highways.
- the development of planning programmes for industrial expansion and the exploitation of natural resources.
- the encouragement of heavy industry to establish in the province "with financial encouragement from the government if necessary".
- the ownership by Quebec Hydro, a public corporation, "of all undeveloped hydro-electric power where it is economically feasible to do so".
- the undertaking of measures to encourage the people of Quebec to invest in the development of the province's natural resources.
- the comprehensive reform of the educational system at all levels.

As well as substantive reforms, the manifesto also committed the party to major changes in the organization of the provincial government. An Economic Planning and Development Council would be established with representatives of labour, industry and the relevant professions to advise the provincial administration on long-range planning. The civil service would be reformed and an independent Civil Service Commission created. A Department of Natural Resources was to be established with wide powers. The existing Department of Industry and Commerce would be given broad authority "to provide industrial development on a regional basis according to an over-all plan". A Department of Cultural Affairs and a Department of Federal-Provincial Relations were to be established.







The pursuit by the Government of Quebec of the policies promised in the 1960 Manifesto and others developed since that time have brought about very different circumstances than before both in the relations between the Quebec and federal authorities, and less directly, between the federal administration and those of the other provinces. In respect to many matters where previously the province of Quebec was inactive the incumbent government has comprehensive and explicit policies -- policies in respect to regional economic development, vocational training, the exploitation of natural resources, cultural affairs including international cultural relations, the channeling of private savings into provincial economic development and so on. New initiatives are in the making in respect to the establishment of a steel complex, immigration, housing and slum clearance and the creation of a public sector in the mining industry. The federal government is directly or indirectly involved in all these matters. Furthermore, the programme of reform to which the new Quebec administration was an extraordinarily costly one and fiscal relations with the federal government became more crucial than before. Thus for the first time the relations between the federal and Quebec governments are not in the traditional terms of centralization versus provincial autonomy but revolve about specific issues where the







the objectives of each are not wholly compatible with those of the other.

### Provincial Economic Interventionism

Quebec was not the only province to begin in the 1960s to develop more comprehensive and aggressive policies than before in respect to economic problems. The developments since the election of the Lesage administration have indeed been dramatic ones in bringing to at least temporary dominance in Quebec those ideas and interests who see the cultural integrity of French-Canada being served by a bold programme of provincial interventionism in economic and other matters. In the other provinces there were, of course, no similar cultural factors at work and no such spectacular break with the past. The new policies of these provinces were pragmatic responses to what their leaders more or less clearly perceived to be deficiencies in federal policies. The vigor and competence with which these new responsibilities for economic growth and development were assumed varied greatly from province to province and in some interventionism is still at a somewhat embryonic stage. However, in all of the provinces there was during the early 1960s more governmental activity than ever before in respect to industrial and trade development and economic control.

The activities of the Government of Manitoba, although it has assumed the new economic responsibilities in a more explicit way than have







most of the provinces other than Quebec, are an interesting example of the new trend. In 1961 42 citizens representing various interests in the province were constituted by the government as the Committee on Manitoba's Economic Future. The major responsibility conferred on the Committee by the Order-in-Council was to undertake such investigations, studies and programs of research as are required of the basic industries in the Province and of the various physical, financial and social factors which determine the growth, expansion and employment potential of such basic industries.<sup>10</sup> The Order-in-Council indicated in general terms how the provincial administration regarded its own responsibilities by stating that such a Committee was necessary "to advise the government in the formulation of appropriate policies and measures in respect of the problems of future growth and development of the economy of the Province and of employment in the Province".<sup>11</sup> The Committee's Report which was presented to the Government on March 6, 1963, made a comprehensive analysis of the possibilities of development in all sectors of the Manitoba economy in the next 15 years so that 75,000 new jobs could be created and made specific recommendations as to how such growth could be secured. The Committee's view of appropriate provincial action was this:

"At the present stage in the Province's development, Government has a prime responsibility in giving incentive to







economic activity by providing specialized aids and services that create the atmosphere in which industrialization can proceed. Establishing these conditions is the most important task of Government at the Provincial level in economic development." 12

Two months after the Committee's report was presented the Manitoba Development Authority was established by statute 13 with the general purpose of "the furthering of the economic development of the province with a view to increasing employment and employment opportunities and raising the standard of living of the people of Manitoba". In more specific terms, the Authority, composed of five Cabinet ministers, was to define provincial economic objectives and to co-ordinate private and public activities in pursuit of these objectives, to design and implement measures for the "promotion of major economic development projects", to take measures to attract investment capital to the province and to work toward the co-ordination of Manitoba's economic policies with those of the federal government, the other provinces and the municipalities. The Act also provided for the establishment of a Manitoba Economic Consultative Board to advise the Authority. The Board was to consist of a chairman and not more than ten members appointed by the Lieutenant-Governor in Council "representative of the leading members of the economic community" along with not more than four other members who would be deputy ministers or other officers of Crown agencies who would serve in an







ex officio capacity.

In 1962 and 1963 six other provinces appointed consultative bodies on economic policy somewhat along the lines of Manitoba -- the Nova Scotia Voluntary Planning Board, the New Brunswick Research and Productivity Council, the Quebec Economic Advisory Council, the Ontario Economic Council, the Saskatchewan Economic Advisory Council and the Alberta Economic and Productivity Council. Most of these bodies were composed of representatives of the major economic interests of the respective provinces and in some cases of government as well. The major responsibilities of these agencies were to advise the provincial administrations on ways to promote industrial development and external markets for provincial products.<sup>14</sup>

Provincial economic interventionism has the result of making provincial objectives more explicit than ever before in respect to matters where the federal government has also assumed responsibilities. There is no reason to believe that these objectives of the two levels of government will always or usually be in harmony. The substance of these federal-provincial conflicts are outlined in Chapter VII.

The increasing scope of provincial activity is closely related to the improved quality of the provincial public services. During the war years and well on into the 1950s the balance of bureaucratic







competence ran heavily in favour of the federal government. In economic policy and other matters the federal Liberals worked in close harmony with civil servants skilled in the sophisticated formulation and implementation of comprehensive objectives. On the provincial level, there was much less expertise and provincial reactions to federal initiatives were often somewhat amateurish. In recent years, however, the situation has changed. The provinces have come increasingly to attract the kind of civil servant who is trained in the social sciences and who has the will and the ability to play an active role in the formulation of public policy. This development has been most spectacular in Quebec but is occurring elsewhere as well. Thus in federal-provincial relations the federal government can no longer rely on the superior skill of its own officials vis-a-vis those of the provinces.

#### The Increasing Importance of Provincial Expenditures.

Another element in the attenuation of federal dominance is that the proportion of total public expenditures made by the provincial and municipal governments combined has shown a secular increase. In the absence of rapid increases in defence expenditures it is likely that this trend will continue.







TABLE IVFederal and Combined Provincial-Municipal Expenditures  
for Selected Years

	<u>Federal</u> <u>as Percentage of Total</u>	<u>Provincial/Municipal</u> <u>as Percentage of Total</u>
1926	36.8	63.2
1930	32.0	68.0
1934	31.6	68.4
1938	33.0	67.0
1942	83.5	16.5
1946	72.4	27.6
1950	52.2	47.8
1952	63.4	36.6
1954	61.4	38.6
1956	55.7	44.3
1958	55.8	44.2
1960	51.2	48.8

Source: National Accounts -- Income and Expenditures,  
Dominion Bureau of Statistics.

Canadians have thus come to look to their provincial and local governments for those public amenities which are in terms of public expenditures most important. Professor Eric Hanson has estimated that if there are no major changes in defence spending and no major reallocations of functions between government each level will in 1980 be spending about one-third of the total public expenditures, a return to the division that prevailed  
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between the Wars.

SUMMARY AND CONCLUSIONS.

A conjuncture of circumstances from the late 1950s onward destroyed the dominance of the federal government which had been established during the Second World War and perpetuated during the subsequent decade. In part the weakening of federal power and purpose was the result of the deficiencies of federal policies in satisfying important sections of Canadian society.







Federal power was challenged by the increasing vigor and competence of the provincial governments who came to be unwilling to play the relatively subordinate role in economic and other matters assigned to them by both the theory and practice of the New National Policy. The policies of the leaders of the new Quebec whose assumption it was that the welfare of French-Canada could be ensured only by aggressive provincial policies in social and economic matters was the most spectacular aspect of this challenge. However, with great variations from province to province, the other provincial administrations became increasingly interventionist in economic matters and came to define their economic and other objectives with more skill and precision than in the past. It can reasonably be argued that up until the present decade Canadian federalism has been sustained because at every period either one level or the other has been relatively immobilist in respect to economic matters. This circumstance has now ceased to prevail.







NOTES.

1. "Federal-Provincial Fiscal Developments", Report of the 1964 Conference, The Canadian Tax Foundation, Toronto, 1965, p. 223.
2. "Growth, Price Stability and the Problem of Unemployment", Kingston, 1960 (mimeo.) p. 5.
3. For an account of these relations written just before the Liberal defeat of 1957 see J. E. Hodgett's "Liberal and Bureaucrat", LXII, Queen's Quarterly, (1955), pp. 76-83.
4. "The Formulation of the Liberal and Conservative Programmes in the 1957 Canadian General Election", 26 Canadian Journal of Economics and Political Science, (1960), p. 565.
5. ibid. p. 573.
6. ibid. pp. 223-224.
7. ibid. p. 6.
8. See Donald V. Smiley "The Two Themes of Canadian Federalism", XXI Canadian Journal of Economics and Political Science, (February, 1965), pp. 80-97.
9. The Manifesto is reprinted in Herbert Quinn, The Union Nationale, Toronto, 1963, pp. 225-235.
10. Reprinted in Manitoba 1926-1975, Report of the Committee on Manitoba's Economic Future, Winnipeg, 1963, Appendix, Part IV, p. 3.
11. ibid.
12. ibid. II, pp. 16-17.
13. Statutes of Manitoba, 1963, Chapter 23.
14. There is as yet little analytical material on these provincial agencies. See, however, two articles in 8 Canadian Public Administration (1965), J. R. Mills, "Voluntary Economic Planning in Nova Scotia, pp. 160-165, and Roland Parenteau "The Quebec Economic Advisory Council", pp. 166-171.
15. Speech on Municipal Tax Problems, Report of the 1963 Conference of the Canadian Tax Foundation, Toronto, 1963, p.







## CHAPTER 4

Devices of Adjustment in the Canadian Constitution.

In the first Chapter we argued that a federal system must develop resources of adaptability if it is to survive. We made a broad distinction between "devices of adjustment" the processes by which the distribution of powers, resources and responsibilities is changed as new circumstances arise, and "devices of articulation" the procedures through which the activities of the central and regional governments are related to one another by their respective executives. This Chapter analyzes the first kind of process in the context of the formal constitutional framework.<sup>1</sup> The contracting out procedure is such a unique contribution to the theory and practice of federalism that we have thought it worthwhile to give this a Chapter to itself.

The Confederation Settlement and the Distribution of Powers.

The British North America Act of 1867 gave to the federal authorities what were then deemed to be the most important responsibilities of government and the access to the financial resources necessary to wield these powers effectively. Apart from establishing a new constitutional system to break the political deadlock of the United Canadas, the prime objectives of the Fathers of Confederation was to create circumstances under which the military defence and economic integration of British North America might effectively be undertaken. So that the economic aims of Confederation might be pursued,







Parliament was given those legislative powers not conferred exclusively on the provinces, including powers over "trade and Commerce", navigation and shipping, banking, interest and legal tender, and copyrights and patents. By confining the provinces to direct taxation, Parliament was given exclusive access to the most lucrative sources of public revenue of the time. In order that effective developmental policies might be pursued by the federal authorities the British North America Act provided that when federal and provincial legislation in the concurrent fields of Agriculture and Immigration should conflict the former was to prevail. Section 145 directed that the immediate construction of the railway linking Canada and the Maritimes be undertaken by the federal government and Sections 147 and 148 outlined the circumstances under which the remaining British territories on the northern half of the continent might be admitted into the Dominion. Thus did the division of powers between the federal and provincial authorities contemplate the political and economic integration of British North America.

The highly centralized constitutional order established by the Confederation settlement stopped short of being a unitary state -- in the language of the day "a legislative union" -- by the provisions of the B.N.A. Act vesting exclusive jurisdiction in the provinces over a group of matters of some importance. If we accept the reasonable assumption that it was the French-Canadian leaders who were instrumental in







securing a federal rather than a unitary constitution, these exclusive provincial powers can be viewed as those where the differences between the two founding cultures were believed to be most crucial and thus must be wielded exclusively by the Quebec authorities. The most important of the concerns assumed to be of direct cultural incidence related to education, the matters covered by the Civil Code adopted for Lower Canada in 1865, municipal affairs and health and welfare institutions. The other side of the coin was that these leaders apparently believed that the sweeping economic powers conferred on the Dominion did not in any way constitute a challenge to the cultural interests of French-Canada. Sir E. P. Taché in the Confederation Debates spoke of the resistance of Lower Canada to representation by population under the existing constitution because that would have placed this section at the mercy of the other but

"It would not be so in a Federal Union for all questions of a general nature would be reserved for the General Government, and those of a local character to the local governments, who would have the power to manage their domestic affairs as they deemed best. If a Federal Union were obtained it would be tantamount to a separation of the provinces, and Lower Canada would thereby preserve its autonomy together with all the institutions it held so dear, and over which they could exercise the watchfulness and surveillance necessary to preserve them unimpaired." ^

Similarly, George-Etienne Cartier asserted of the projected union:

"He did not entertain the slightest apprehension that Lower Canada's rights were in the least jeopardized by the provision that in the General Legislature the French-Canadians of Lower Canada would have a smaller number of representatives







than all the other origins combined. It would be seen by the resolutions that in the questions which would be submitted to the General Parliament there could be no danger to the rights and privileges of the French-Canadians, Scotchmen, Englishmen or Irishmen. Questions of commerce, of international communications, and all matters of general interest, would be discussed and determined in the General Legislature; but in the exercise of the functions of the General Government, no one could apprehend that anything could be enacted which would harm or do injustice to persons of any nationality." <sup>3</sup>

For the English Canadian side, both A. T. Galt <sup>4</sup> and George Brown <sup>5</sup> had expectations of the proposed union much like those of Cartier and Taché: the broad division of governmental powers between the Dominion and the provinces would make easily compatible the effective economic integration of British North America and the cessation of cultural strife which had poisoned and paralyzed the constitutional system of the Province of Canada.

The British North America Act thus provided for a highly centralized union in two ways:

First, what were then the most important public responsibilities and the most important sources of public revenues were given to the Dominion rather than the provinces.

Second, the federal authorities were given what we shall call "quasi-unitary" powers to intervene directly in matters otherwise within the exclusive legislative jurisdiction of the provinces -- the powers of reservation and disallowance of provincial legislation; powers under Section 92 10 (c) to bring







provincial "Works" under federal jurisdictions and to protect the rights of certain denominational schools. However, the original distribution of legislative powers, revenue resources and functional responsibilities did not preclude later developments to a much less centralized federal system than that deemed appropriate by the Fathers of Confederation in the face of the problems which confronted them. It was possible, and it has happened in some periods in the past century, that the most important public functions would be precisely those within provincial rather than federal jurisdiction. The distribution of legislative powers and revenue sources set out in the B.N.A. Act was subject to judicial interpretation which could, and would, enhance the authority of the provinces as against the Dominion. Finally, the "quasi-unitary" devices were to be employed at the discretion of the federal authorities and the extent to which these devices were to be brought into play depended entirely on the judgment of the federal executive and Parliament.

#### Devices of Adjustment I: Constitutional Amendment.

The most explicit kind of adjustment in a federal system is one altering the text of the constitution to re-allocate particular legislative powers between the federal and regional governments. In Canada as in other established federations this kind of adaptation to existing circumstances has proved difficult to effect. Since 1867 there have been only three







constitutional amendments altering the respective legislative powers of Parliament and the provinces -- that of 1940 giving the federal government exclusive jurisdiction over unemployment insurance and those of 1951 and 1964 conferring on Parliament concurrent jurisdiction with the provinces in the fields of old age pensions and survivors' benefits in a proposed federal contributory pension programme respectively. All three amendments were effected only after the federal government had obtained the approval of all the provinces and each change involved the transfer to the federal authorities of costly responsibilities in the field of welfare. Barring a very basic redrafting of the existing constitution, it is very unlikely that in the foreseeable future constitutional amendment will emerge as an important device of adjustment, with the possible exception of future transfers of legislative power to Parliament in respect to very expensive provincial functions.

#### Devices of Adjustment II: Judicial Review.

In Canada as in other federal systems evolving patterns of judicial review have proved to be more important than constitutional amendment in changing the effective distribution of legislative powers contained in the original constitutional document. There is a vast literature of analysis and commentary on judicial review of the division of legislative powers between Parliament and the provinces under the







British North America Act<sup>7</sup> and it would be impossible in a study such as this to review even in outline this aspect of Canadian constitutional development. There is general agreement that the Judicial Committee of the Privy Council from the late nineteenth century onward restricted the powers of Parliament by giving a restrictive interpretation of its authority to enact legislation in respect to the "Peace, Order and Good Government of Canada" and to "Trade and Commerce" and enlarged the scope of provincial activity to legislate exclusively in respect to "Property and Civil Rights" and to "Generally all Matters of a merely local or private Nature in the Province".<sup>8</sup> In 1938 F. R. Scott made a summary of the additions to provincial and Dominion powers made by judicial interpretation and to a very large extent these accretions are still operative in the Canadian constitution:

#### " Dominion Additions

1. Liquor control (in small part).
2. Sunday observance.
3. Interprovincial telephones.
4. Labour contracts on Dominion undertakings.
5. Radio broadcasting.
6. Aeronautics.
7. Criminal trade practices.
8. Dominion companies cannot have their capacity destroyed by provincial laws.
9. Customs dues leviable on the importation of provincial crown property.
10. Farmers-Creditors Arrangements.
11. Trade and Industry Commission.

#### Provincial Additions

1. Treaty legislation upon any subject belonging to the Provinces.
2. Regulation of intra-provincial trade.
3. Regulation of intra-provincial marketing.
4. Regulation of intra-provincial production.
5. Regulation of intra-provincial prices.







6. Wages control.
7. Hours of labour by day or by week.
8. Weekly day of rest.
9. Unemployment insurance.
10. Workmen's compensation.
11. Health regulations.
12. Trades Union laws.
13. Industrial disputes.
14. Liquor control (in large part).
15. Insurance laws.
16. Control of security sales: "blue sky" laws.
17. Right to create companies with power to act outside the Province.
18. Taxing power extended to taxes on consumption and sales.
19. Escheats.
20. Ownership of Indian lands and beds of navigable rivers.
21. "Property and Civil Rights over-rides Dominion residuary clause except in extreme emergency" <sup>9</sup>

Since the end of the Second World War judicial review has assumed a much more limited role than previously in determining the respective legislative powers of Parliament and the provinces. In particular, there are many fewer judicial challenges than in the past to the validity of federal and provincial  
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legislation. The most spectacular disputes between the federal and provincial governments -- the issue of fiscal powers between the Quebec and federal governments in 1954, Newfoundland's financial rights under the Terms of Union, the long dispute between the federal and British Columbia administrations about hydro-electric development, etc. -- have been resolved by means other than judicial determination. Prime Minister Pearson on December 31, 1964 announced that the question of ownership of offshore mineral rights was being submitted to the Supreme Court of Canada for decision; this announcement came after several years of fruitless







negotiation about the matter between the federal government and the provinces concerned. On the basis of these developements J. A. Corry asserted in 1959 that "The courts are retiring, or being retired, from their posts as the supervisors of the (federal) balance."<sup>11</sup> Corry attributed this trend to developements outside the judiciary itself. According to his explanation, the tradition of judicial review of the Judicial Committee of the Privy Council, by restricting the powers of Parliament and enlarging those of the provinces, had caused those who had been concerned with finding national action to meet national needs to try to "turn the flank of the constitutional obstacles". The new methods for accomplishing this lay in the exercise of the federal spending power and in the various forms of federal-provincial collaboration. Further, neither the provinces nor the big business interests seemed now disposed to support judicial challenges to the validity of federal legislation as they had done in the past.

It seems plausible that the failure to resolve federal-provincial disputes by resort to judicial interpretation has a cumulative quality in that the absence of such interpretation over the years leads to increasingly wider areas of uncertainty as to what the courts would do if called upon to rule on particular exercises of federal or provincial powers. In such circumstances individuals and governments may well be







inhibited from resorting to the judicial process. Thus Prime Minister Lesage's press statement at the end of the Federal-Provincial Conference of March 1964 that his Government was prepared to seek its rights through the courts was widely interpreted as a direct challenge to Canadian federalism -- not only did this statement reveal the Quebec leader's extreme impatience with the workings of the procedures of intergovernmental consultation but the other governments concerned might reasonably be apprehensive that many established arrangements were vulnerable to judicial challenge.

A combination of circumstances thus indicates that judicial review will probably play a relatively minor role in federal-provincial relations in the foreseeable future. Most of the major issues between the federal and provincial governments seem not to be susceptible of judicial resolution. Business interests are less disposed than in the past to support judicial challenges to federal power. The machinery of intergovernmental consultation is becoming increasingly institutionalized and legitimized. The other "devices of adjustment" analyzed in this Chapter offer alternative possibilities for constitutional adaptation. Judicial review results in a delineation of federal and provincial powers where the perceived needs of the federal system are for a more effective articulation of these powers. In general, the prospects are remote that the courts will reassume a major role as "keepers







of the federal balance".

Devices of Adjustment III: The Quasi-Unitary Features of the Constitution.

Not only did the Confederation settlement vest the most lucrative sources of revenue and what were then regarded as the most crucial functions of government in the federal government but the federal authorities were also given powers to intervene unilaterally on matters otherwise within the exclusive legislative jurisdiction of the provinces.

- under Section 93 (applied later to Manitoba, Prince Edward Island, Alberta and Saskatchewan as these entered the Dominion as provinces) the federal authorities were given powers to protect the rights of denominational schools existing at the time of Confederation or subsequently established.
- Under Section 95 both Parliament and the provinces might enact legislation in respect to Agriculture and Immigration but any provincial enactment in these fields was operative only so long as it was not "repugnant to any Act of the Parliament of Canada".
- under Section 92 10 (c) Parliament might declare any "Work" wholly within a province to be "for the general advantage of Canada or for the Advantage of two or more of the Provinces" and thus bring the work within federal jurisdiction.
- under Sections 55 and 90 the Governor-in-Council







might disallow any provincial bill within a year after its enactment and the Lieutenant-Governors of the provinces might reserve provincial bills for the consideration of the Cabinet with such reserved legislation being inoperative in the absence of positive action by that body.

What we have called the quasi-unitary features of the constitution have not in the past two decades been significant in the evolution of Canadian federalism:

1. The federal authorities have only once - in 1896 - exercised their powers to protect the rights of denominational schools under the provisions of Section 93 and, as is well known, the resolution of the matter at hand was later made through an agreement between the Manitoba and the new federal administration. The provisions of Section 93 dealing with federal protection of denominational rights in education can thus be said to be a dead letter.
2. In only two important circumstances in the period since the Second World War has Section 92, 10 (c) been used to bring significant provincial matters within federal jurisdiction. This provision was employed in the Atomic Energy Control Act<sup>12</sup> of 1946 to bring under federal control the production and use of atomic energy and the production and refining of certain substances from which atomic energy was made as well as research into such matters. The National Capital Act<sup>13</sup> of 1958







declared that all works of the Federal District Commission were to be for the general advantage of Canada. Apart from these two instances, this Section has been used only in private bills to bring certain local railway companies and bridges under federal jurisdiction.

3. The last provincial statute disallowed by the federal Executive was a 1943 Alberta enactment prohibiting the sale of land in the province to Hutterites and enemy aliens for the duration of the war and the disallowance power appears to be temporarily at least in abeyance.<sup>14</sup> During the last two decades successive federal governments have been requested by influential groups to disallow such controversial legislation as the Saskatchewan Mineral Taxation Act of 1944, the Quebec Freedom of Worship Act of 1954 and enactments of Prince Edward Island, Newfoundland and British Columbia restricting certain trade union activities. In explaining his Government's refusal to disallow Newfoundland labour legislation enacted in 1959 Prime Minister Diefenbaker gave a narrow definition of the grounds upon which, according to his understanding of the evolving conventions of the constitution, disallowance might appropriately be used:

"Whatever one's feelings with respect to legislation passed by provincial legislatures may be, however much one may dislike it, the gradual development has been that the federal government through the Governor-General in Council does not exercise that power where there is on the face of it an apparent conformity with the legislative authority of the legislature







15

which passed it."

A somewhat less restrictive interpretation of the grounds for disallowance was continued in a federal Order-in-Council validating a Saskatchewan bill of 1960 which had been reserved by the Lieutenant-Governor of the province:

"And whereas it is the established policy in these matters to consider first the question of whether the bill is within the competence of the legislature to enact and second the question of whether it is in conflict with national policy or interest, and if these questions be resolved favourably, to recommend that assent be given, unless the bill is otherwise objectionable." <sup>16</sup>

Apart from the requirements that the federal veto must be exercised within one year after a bill's enactment by a province and that this power must be used against such enactment in its entirety, there are no legal limitations to the federal Cabinet's authority to disallow provincial statutes. It is impossible to predict with any certainty the way in which this device may be employed in the future. However, the traditions which seem to be in the making call into question the appropriateness of disallowance except under circumstances where an enactment is perceived by the federal Cabinet to be clearly outside the legislative competence of a province or where some very fundamental federal objective is directly challenged. It would seem also that the use of disallowance in any but the most unusual circumstances would almost inevitably inhibit the kinds of collaborative relations between the federal government and the provinces that are necessary if the federal system is to operate in a tolerably effective







manner.

The evolving traditions in respect to reservation parallel those of disallowance. In the spring of 1961 the Lieutenant-Governor of Saskatchewan, Frank L.

Bastedo, reserved a provincial act relating to mineral contracts.<sup>17</sup> Mr. Bastedo had not consulted with the federal Cabinet prior to the action and later a federal Order-in-Council was enacted validating the provincial statute. The statements of Prime Minister Diefenbaker in the House of Commons made plain that the federal government believed that the Lieutenant-Governor had acted outside of the conventions of the constitution and the Prime Minister asserted that the government was considering authorizing instructions to the Lieutenant-Governors that provincial bills should be reserved only upon direction from the federal Cabinet, although these instructions appear not to have been issued. As is the case with disallowance, reservation appears to be temporarily at least in abeyance.

In summary, what we have called the quasi-unitary features of the British North America Act have not in the past two decades been extensively used to enhance the position of the federal government at the expense of the provinces. The exercise of these powers in most cases involves direct challenges to the provincial administrations concerned. Although one cannot with assurance predict the circumstances under which these powers will be wielded, their exercise will almost







inevitably inhibit what have come to be regarded as the necessary conditions of constructive federal-provincial relations.

#### Devices of Adjustment IV: The Federal Spending Power.

In Canada as in other federations it has become increasingly common for the federal government to give financial support to activities within the legislative jurisdiction of the regional administrations.

Characteristically, those who receive such payments -- individuals, private associations, local authorities and state or provincial governments -- must meet the conditions of eligibility determined by the federal authorities.<sup>18</sup>

The widespread use of this device has permitted the federal government to involve itself in a large number of matters otherwise outside its jurisdiction under the constitution as judicially interpreted.

The limits of the federal spending power in the Canadian constitution have never been judicially determined with any precision. The Judicial Committee of the Privy Council in declaring invalid the federal Employment and Social Insurance Act of 1935 declared:

"That the Dominion may impose taxation for the purpose of creating a fund for special purposes and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities could not as a general proposition be denied.....But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.

It may still be legislation affecting the classes of subjects enumerated in Section 92, and, if so, would be ultra vires. In other words, Dominion







legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province: or encroach upon the classes of subjects which are reserved to provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the provincial domain....." 19

By upholding the "general proposition" that Parliament might tax and spend as it chose but by qualifying the power with imprecisely worded restrictions the 1937 decision did little to clarify the limits of the federal spending power. Federal policy-makers seem to have taken this decision to mean that the federal authorities are precluded from supporting activities within provincial jurisdiction wholly or partly from the proceeds of a levy made explicitly for these purposes. Thus when in 1950 the federal government decided to finance the projected Old Age Security pensions from three special taxes a constitutional amendment was sought and secured to give Parliament concurrent jurisdiction with the provinces in that field, although when in 1944 provision was made for family allowances financed wholly from the general revenues of the Dominion no amendment was believed necessary.

In 1957 the Exchequer Court of Canada upheld the validity of the federal Family Allowance Act.<sup>20</sup> F. A. Angers had claimed deductions on his federal income tax as if his children did not qualify for family allowances







although they were so eligible. The Court refused to accept Angers' claim for such deductions. Professor Bora Laskin has said that this decision ".....lends emphasis to the view that the courts have no concern with the disbursement of federal funds which have been<sup>21</sup> validly raised".

Commentators on the Canadian constitution have defended the exercise of the federal spending power in respect to matters within the legislative jurisdiction of the provinces on two grounds. First, it has been justified under Parliament's jurisdiction enumerated in Section 91 (1) of the B.N.A. Act to legislate in respect to "The Public Debt and Property".<sup>22</sup> Second, it has been claimed that under British parliamentary traditions the prerogative power permits the Crown to disburse as it chooses subject only to prior<sup>23</sup> parliamentary authorization. However, there has been no definitive determination of this matter by the courts and the conclusions of L. M. Gouin and Brooke Claxton who undertook a detailed examination study of the spending power as part of their investigation for the Rowell-Sirois Commission<sup>24</sup> would lead one to believe that several of the existing programmes of federal expenditures on matters within the legislative jurisdiction of the provinces are of doubtful constitutional validity.

The exercise of the federal spending power has been the chief mechanism by which the influence of the federal government has been enhanced vis-a-vis the







provinces in the past two decades. The nature and extent of such federal involvement through conditional grants to the provinces and local authorities will be analyzed in Chapter VI. Federal financial assistance has been made available to individuals and non-governmental associations in such diverse forms as family allowances, per capita grants to universities, and grants-in-aid of cultural and athletic activities. The federal power to spend is also interpreted to encompass the federal power to lend to governments or to private individuals and groups or to guarantee loans that they make. In a constitutional system which has proved relatively resistant to change through amendment or evolving patterns of judicial review, important re-adjustments in the relative roles of the federal and provincial governments have come to be effected largely through the exercise of the federal power to spend on objects within provincial legislative jurisdiction and the concomitant of this power that the federal authorities may determine the conditions under which such financial benefits will be conferred.

The use of the spending power results in a situation where the sharing of the financial burdens and functional responsibilities between the federal and provincial governments is effected in respect to many important matters by policy decisions of the federal authorities, acting either in collaboration with the provinces or unilaterally, rather than by the







constitution as judicially interpreted. For the most part the B.N.A. Act and its subsequent interpretation by the courts relates to the regulatory rather than the service-providing activities of government. While there is a large corpus of judicial decision defining the respective legislative powers of Parliament and the provinces in such spheres as the regulation of insurance, agricultural marketing, the incorporation of companies, the control over trade and transportation, industrial relations, etc. the courts have pronounced relatively little about the limits of federal involvement in health, welfare and education either through direct financial assistance to provinces, local authorities, private groups and individuals or through the exercise of federal ancillary powers in regard to such federal responsibilities as Indian affairs, immigration, defence and penitentiaries.

The distribution of legislative powers under the B.N.A. Act as judicially interpreted has, however, a significant effect on the way in which the federal power to spend is exercised. In general terms, federal control through financial assistance to an activity within provincial legislative jurisdiction proceeds through indirection; the federal authorities provide financial inducements for those eligible -- provincial or local governments, private individuals or groups -- to conform to federal conditions but refusal to do so is not an offense under federal law. Further, in regard to such matters, the federal authorities characteristically







accomplish their objectives through the collaboration of private groups, local authorities or provincial governments rather than by the direct action of their own administrative agencies.

The exercise of the federal spending power has been a device making for both stability and change in the Canadian constitutional system. This device has made a stable division of legislative powers between Parliament and the provinces compatible with evolving expectations about the appropriate roles of each and it is reasonable to conjecture that if the federal involvement had been confined to matters within its legislative jurisdiction there would have been strong pressures in the period after the Second World War to effect major changes through constitutional amendment or delegation. The evolution of the contracting-out device to be used in combination with the spending power offers yet a new dimension to flexibility under the existing constitution.

A related question concerns the constitutional limits, if any, of the power of a province to expend funds on matters outside its legislative jurisdiction. According to the argument of F. R. Scott that "making a gift is not the same as making a law" and that the Crown may spend as it chooses after appropriate authorization by the legislature there are no such limits. In the past, the Government of Quebec has from time to time made grants for educational and cultural activities







outside provincial boundaries and the establishment in 1963 of a Service du Canada Français D'Outre Frontières in the Department of Cultural Affairs appears to indicate a provincial policy of increasing this kind of assistance. As is the case with the federal spending power, this matter has not had definitive judicial interpretation.

Devices of Adjustment V: The Particularity of the Position of the Individual Provinces.

One of the more distinctive features of the law and practice of Canadian federalism is that the relations between the federal government and the individual provinces vary. This differentiation was legally defined both in the British North America Act of 1867 and the circumstances under which the later six provinces entered Confederation and, with the exception of Alberta and Saskatchewan, which were established in 1905 under almost identical legislation, no province is, in a constitutional sense, precisely "comme les autres".<sup>27</sup> These particularities in law have been combined with the willingness of the federal authorities, since Confederation to meet the special needs of particular provinces and groups of provinces. The resulting situation gives the federal system resources of flexibility it would not otherwise have.

Like other politicians in the British parliamentary tradition those responsible for the British North America Act of 1867 made no clear-cut distinction between fundamental constitutional law and other kinds of







statutory provisions. The Act thus contained not only what one can reasonably regard as the constitution of the new Dominion, including the constitutions of the provinces of Ontario and Quebec which it created, but also a large number of transitional measures to effect the establishment of the new federation. The most characteristically federal features of the Act (Sections 91, 92, 93 and 95) conferring their respective legislative authority on Parliament and the provinces applied equally to Ontario, Quebec, Nova Scotia and New Brunswick. However, important provisions gave recognition to the particularity of Quebec.

- in Quebec alone of the provinces English and French had equal official status in the proceedings and records of the legislature and in the courts in the province established either by the Dominion or Quebec (Section 133).
- it was provided that with the consent of the common-law provinces i.e. those other than Quebec, the Parliament of Canada might make provision for the uniformity of any or all laws related to property and civil rights (Section 94). If this Section had been implemented, as was apparently expected by the Fathers of Confederation, there would have resulted a significantly different distribution of legislative powers between the Quebec Legislature and Parliament than prevailed in respect to the other provinces.
- it was provided that Senators from Quebec should either hold the qualifications of \$4,000 in unencumbered real property within one of the 24







electoral divisions outlined in the Act and from which they were chosen or be a resident of such division (Section 23, 6). Apart from Quebec it was provided only that a Senator be a resident of the province from which he was appointed.

- it was provided that in 12 electoral divisions sending members to the Legislative Assembly of Quebec the boundaries could not be altered without the concurrence of a majority of the members of those districts specified in the Second Schedule of the Act (Section 80).
- it was provided that judges of the courts of Quebec should be selected from the Bar of that province (Section 98). There was no such provision in respect to the other provinces.

The complex financial settlement enacted in Sections 102 to 124 of the B.N.A. Act provided for varying patterns of financial relations between the original provinces and the Dominion.

The differentiated position was extended as new provinces entered Confederation:

- under Section 30 of the Manitoba Act of 1870, Section 21 of the Saskatchewan Act of 1905 and Section 21 of the Alberta Act of 1905 Crown lands of these provinces were to be administered by the Dominion. This situation lasted until 1930 when the Prairie Provinces had these lands brought under their control.
- under the Schedule of the Imperial Order-in-Council







admitting Prince Edward Island to the Dominion in 1873 the federal government accepted permanent responsibilities for

"Efficient Steam Service for the conveyance of mails and passengers, to be established and maintained between the Islands and the Mainland of the Dominion, Winter and Summer, thus placing the Islands in continuous communication with the Inter-colonial Railway and the Railway system of the Dominion.

The maintenance of telegraphic communication between the Islands and the Mainland of the Dominion." 28

- Section 17 of the Terms of Union with Newfoundland enacted as federal legislation in 1949 provided for the protection of denominational rights in the Newfoundland school system differently than did Section 93 of the B.N.A. Act applying to the other provinces. According to the 1949 provision the Legislature of Newfoundland was denied the authority to make laws "prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools, or denominational colleges" existing at the time of Union. These institutions are to receive funds voted by the Legislature on a non-discriminatory basis. Although these denominational privileges are broader than those under Section 93, and the definition of prejudicial provincial action more specific, the Terms of Union did not give the federal executive and Parliament any powers to protect the rights of an aggrieved minority and such an appeal must thus be directly to the courts.

The tangled history of federal provincial financial







relations has had as one of its major themes the willingness of the federal government to accede to the needs and pressures of individual provinces or groups of provinces. The process was begun in 1869 when the federal authorities moved away from the financial provisions which were specified in the B.N.A. Act to be "in full Settlement of all future demands on Canada" to meet the exigencies of Nova Scotia.<sup>29</sup> Since that time the financial relationships between the federal government and the provinces have remained stubbornly resistant to being subsumed under any general rationale. On three occasions -- in 1907, 1941 and 1945-46 -- the federal governments of the day have attempted to arrive at a stable financial settlement with the provinces and on the latter two occasions the suggested financial terms were related to comprehensive reallocations of functional responsibilities between the two levels. None of these attempts was successful and although since 1947 the general principle of equalization has been established the federal government has continued to respond positively on occasion to the needs of particular provinces. In the last thirty years also, successive federal administrations have been willing to take measures to mitigate the particular difficulties of the Prairie and Atlantic Provinces. Since the establishment of the Prairie Rehabilitation Farm/Administration in 1935 the federal authorities have participated in a series of programmes with the Prairie Provinces specifically designed to aid western agriculture -- including various ad hoc measures such as those to move fodder into drought areas, the compensation







of farmers for unharvested crops, studies undertaken under the auspices of the Federal-Provincial Prairie Provinces Water Board etc, The difficulties of the Atlantic Provinces have also been recognized in such federal policies as those related to the Maritime Marshland Development Programme begun in 1943, the activities of the Atlantic Provinces Power Development Programme from 1958 onward and the unconditional subsidies paid since 1958-59 as Atlantic Provinces Adjustment Grants. Over the years also, the federal government has been willing to share with individual provinces the financial responsibilities for particular capital works including among many others those related to the South Saskatchewan River Irrigation and Power project, the St. Mary's, Bow River and Eastern Irrigation projects in Alberta, the Metro Toronto Conservation Programme and the Montreal World's Fair. In general then, federal-provincial financial and administrative relations have been characterized from the first by a differentiation between the various provinces and groups of provinces.

Several other actual or projected procedures involve some recognition of the particularity of the provinces:

1. The delegation of legislative powers between Parliament and the provinces both under the existing conditions and the terms of the so-called Fulton-Favreau formula provides possibilities for provincial







differentiation.

2. The contracting-out device as it relates both to conditional grant programmes and to wholly federal programmes makes possible a different sharing of financial and administrative responsibilities between the federal government and those provinces who choose to participate and those who do not.

3. It is possible that there will in the future be more explicit recognition given to the more populous provinces in the making of certain kinds of decisions:

- a) The federal enactment of 1965 setting up the Canada Pension Plan provides that any future federal enactment changing certain basic features of the Plan shall not be proclaimed to be in effect until after the consent of the Lieutenant-Governor in Council of at least two-thirds of the included provinces having at least two-thirds of the population of the included provinces has been secured.
- b) The so-called Fulton-Favreau formula for constitutional amendment provides that certain amendments can be made only with the consent of Parliament and that of two-thirds of the provinces having at least fifty per cent of the population of Canada. Those amendments relate in general to the structure and functioning of the federal executive and legislature.

In summary, the law and practice of the Canadian







constitutional system provide for many kinds of differentiation between the positions of individual provinces and groups of provinces in their relations with the federal government. This tradition has provided a major resource of adaptability in the Canadian federal system.

Devices of Adjustment VI: The Inter-Governmental Delegation of Powers.

An alternative to the redistribution of legislative powers between Parliament and the provinces through constitutional amendment or changing patterns of judicial review is the inter-governmental delegation of powers by the mutual consent of the governments concerned. Under the delegation procedure some or all of the provinces would confer certain of their powers on Parliament or agencies operating under federal legislation or, alternatively, federal powers might be wielded either by the provincial legislatures or provincial executive agencies. Many students of the Canadian constitution have believed delegation to be particularly appropriate to the regulatory activities of government where the constitutional division of legislative powers sometimes make effective public control difficult or impossible and where the sharing of responsibilities through the grant-in-aid device is not feasible.

Section 94 of the British North America Act of 1867 contemplated the early assimilation of the body of legislation relating to "Property and Civil Rights" in







the provinces other than Quebec and that in this field by provincial agreement uniform federal law related to these matters would replace the enactments of the individual legislatures in these provinces with a common law tradition. This Section has never become operative although from time to time constitutional specialists have suggested that it be used to overcome what they regard as an impasse in the division of legislative powers.<sup>30</sup>

The Rowell-Sirois Commission recommended that constitutional provision be made for the inter-governmental delegation of legislative powers as a device for "over-coming....the difficulties which arise from the division between the provinces and the Dominion of legislative powers over many complex economic activities.....Such a power of delegation would give the constitution a flexibility which might be very desirable. With the present degree of economic integration on a national scale it is extremely difficult for either the Dominion or a province to frame legislation which will deal separately and effectively with the local or with the inter-provincial aspects of business activity as the case may be".<sup>31</sup>

The Commission suggested that delegation might be useful in respect to the marketing of agricultural products, the control of fisheries, industrial disputes and the regulation of insurance companies.<sup>32</sup> However, it was recognized as very doubtful that such delegation







might validly be effected under the existing  
<sup>33</sup>  
 constitution.

Two post-war decisions of the Supreme Court of Canada have clarified the present constitutional position of delegation.  
<sup>34</sup> Essentially this position is that neither Parliament nor a provincial legislature may delegate any of its legislative powers to the other but that either might so delegate to a body subordinate to the other.

At present delegation is used under two federal enactments to confer federal powers on provincial agencies:

- a) Section 2 (1) of the Agricultural Products Marketing Act enacted in 1949 reads:

"(1) The Governor-in-Council may by order grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of such agricultural products outside the province in interprovincial and export trade and for such purposes to exercise all or any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural product locally within the province.

(2) The Governor-in-Council may by order revoke any authority granted under subsection one."

At the end of 1964 the Governor-in-Council had delegated powers in extra-provincial trade to 36 marketing boards operating under provincial legislation. In such actions the federal authorities do not attempt to influence boards in the various provinces to make their regulations uniform but simply act to give their







regulations extra-provincial effect.

b) In 1954 Parliament enacted the Motor Vehicle Transport Act<sup>36</sup> to make the regulations of provincial motor transport boards operative in respect to extra-provincial traffic. In the case of Winner v. S.M.T. (Eastern Ltd. and A.G.-N.B.)<sup>37</sup> decided by the Supreme Court of Canada in 1951 the validity of provincial regulation of such traffic was denied. The federal Government in the light of the decision apparently concluded that it was inappropriate to enact a system of extra-provincial motor transport regulation itself. At the end of 1964 the powers of extra-provincial regulation had been extended by Order-in-Council to the motor vehicle transport boards of all the provinces except Newfoundland. Although the power has never been exercised Section 5 of the Act provides that "The Governor-in-Council may exempt any person or the whole or any part of an extra-provincial undertaking or any extra-provincial motor transport from any or all of the provisions of this Act".

The so-called Fulton-Favreau formula provides a procedure which will if the formula becomes operative, permit the mutual inter-delegation between Parliament and the provinces of the authority to enact particular pieces of legislation within the other's competence. The relevant Sections of the Draft Bill agreed upon by the federal and provincial governments in 1964 reads as follows:

"94A. (1) Notwithstanding anything in this or in







any other Act, the Parliament of Canada may make laws in relation to any matters coming within the classes of subjects enumerated in classes (6), (10), (13) and (16) of Section 92 of this Act, but no statute enacted under the authority of this subsection shall have effect in any province unless the legislature of that province has consented to the operation of such a statute in that province.

(2) The Parliament of Canada shall not have authority to enact a statute under Subsection (1) of this section unless

(a) prior to the enactment thereof the legislatures of at least four of the provinces have consented to the operation of such a statute as provided in that subsection, or

(b) it is declared by the Parliament of Canada that the Government of Canada has consulted with the governments of all the provinces, and that the enactment of the statute is of concern to fewer than four of the provinces and the provinces so declared to be concerned have under the authority of their legislatures consented to the enactment of such a statute.

(3) Notwithstanding anything in this or in any other Act, the legislature of a province may make laws in the province in relation to any matter coming within the legislative jurisdiction of the Parliament of Canada.

(4) No statute enacted by a province under the







authority of subsection (3) of this section shall have effect unless

- (a) prior to the enactment thereof the Parliament of Canada has consented to the enactment of such a statute by the legislature of that province, and
- (b) a similar statute has under the authority of subsection (3) of this section been enacted by the legislatures of at least three other provinces.

(5) The Parliament of Canada or the legislature of a province may make laws for the imposition of punishment by fine, penalty or imprisonment for enforcing any law made by it under the authority of this section.

(6) A consent given under this section may at any time be revoked, and

- (a) if a consent given under subsection (1) or (2) of this section is revoked, any law made by the Parliament of Canada to which such consent relates that is operative in the province in which the consent is revoked shall thereupon cease to have effect in that province, but the revocation of the consent does not affect the operation of that law in any other province, and

- (b) if a consent given under subsection (4) of this section is revoked, any law made by the legislature of a province to which the consent relates shall thereupon cease to have effect.

(7) The Parliament of Canada may repeal any law made by it under the authority of this section, in so far as it is part of the law of one or more provinces,







but if any repeal under the authority of this subsection does not relate to all of the provinces in which that law is operative, the repeal does not affect the operation of that law in any province to which the repeal does not relate.

(8) The legislature of a province may repeal any law made by it under the authority of this section, but the repeal under the authority of this subsection of any law does not affect the operation in any other province of any law enacted by that province under the authority of this section." <sup>38</sup>

The circumstances surrounding the discussions on the amending procedure in the past five years indicate that the delegation provisions are in a sense an off-set to the relatively inflexible method of amending the constitution as it relates to the division of legislative powers between Parliament and the provinces. It is, however, impossible to predict the extent that the delegation procedure will be used if the projected amending formula becomes operative.

Devices of Adjustment VII: The Federal Emergency and Defence Powers.

It is a truism of Canadian constitutional law that since the decision of the Judicial Committee of the Privy Council in the Local Prohibition case of 1896 the courts have followed a restrictive interpretation of the general powers of Parliament to legislate in respect to the "Peace, Order and Good Government of Canada" in respect to all matters not assigned exclusively to the provinces. In the broadest of terms, the federal authorities have







few opportunities, apart from circumstances related to international hostilities, to extend their jurisdiction to matters otherwise within provincial control on the justification that the subject in question has become of urgent and country-wide importance and thus within the general powers of Parliament under the opening sentence of Section 91. The validity of this statement is not in any significant way qualified by a contradictory trend of judicial decisions beginning with Russell v. The Queen in 1882 which would give a less restrictive interpretation to the federal residual power.

In Canada as in other federations the normal distribution of legislative powers between the federal and the regional governments does not operate when the country is engaged in full-scale international hostilities. The constitutional justification for this over-riding of provincial powers has been the opening words of Section 91 allowing the federal Parliament to make laws in respect to the "Peace, Order and Good Government" of Canada. There is no incompatibility between the necessities of defence and the long-run survival of federal institutions if emergency powers are invoked only when the country is fully committed to international conflict and if the normal practices of federalism are restored within a short time after such hostilities end. More difficulties arise when emergency powers are exercised (1) after an international conflict is ended in fact, if not in law, to permit the federal government to deal with economic and other dislocations attributed to the war; (2) in periods of acute international tension







short of full-scale hostilities. The continuing state of international crisis in which we all live and the nature of modern mobilization on either a partial or a total basis make the normal workings of federalism particularly vulnerable to international developments and the views of the federal authorities about appropriate responses to these developments.

The War Measures Act enacted by Parliament in 1914 provided that "the Governor-in-Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary for the security, defence, peace, order, and welfare of Canada". Among the powers which might be exercised by Parliament and which were enumerated in the Act were those over "trading, exportation, production and manufacture" and "Appropriation, control, forfeiture, and disposition of property or of the use thereof". The Act also provided that the issue of a proclamation by the Governor-in-Council should be conclusive evidence of the existence of a state of emergency.

Most of the orders and regulations made under the War Measures Act were repealed from January 1, 1920 under an Order-in-Council of December 20, 1919. From this repeal were excluded, among other specific orders, those related to the control of paper which were to remain in force until the end of another session of Parliament. In Fort Frances Pulp and Paper Co. Ltd. v.







39

Manitoba Free Press Co. Ltd. the Judicial Committee of the Privy Council in 1923 upheld the power of the federal government to continue the controls over paper after the actual hostilities had ceased but "while the effects of war conditions were still operative". The impact of this decision was to give constitutional justification to the federal government's actions in over-riding provincial legislative powers to facilitate the transition to peace-time conditions after both the First and Second World Wars and to confer on the federal authorities a wide measure of discretion in determining when conditions were appropriate to the restoration of the normal workings of federal institutions.

The War Measures Act was never repealed and was proclaimed in effect on the outbreak of war in 1939. The sweeping powers conferred on the Governor-in-Council, enumerated in a sense by other war-time legislation such as the Department of Munitions and Supply Act and The National Resources Mobilization Act, provided the legal basis for federal action toward a more complete mobilization of resources than had been effected in the previous conflict. In the fall of 1945 the Government introduced into Parliament the National Emergency

40

Transitional Powers Act which read in part:

"....The Governor-in-Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of:

(b) facilitating the readjustment of industry and







and commerce to the requirements of the community in time of peace;

(c) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace;

(d) continuing or discontinuing in an orderly manner, as the emergency permits, measures adapted during and by reason of the war."

It was clear both by the Government's sponsorship of this enactment and by policy statements made by its leaders of the end of the war that federal emergency powers would be used to effect an orderly transition to peace-time conditions and that the federal authorities would themselves determine the tempo of decontrol and the restoration of the normal division of legislative powers between Parliament and the provinces.

The Government did not invoke the War Measures Act during the Korean conflict. However, certain federal emergency powers were wielded under the Essential Materials (Defence) Act of 1950 and the Emergency Powers and the Defence Production Acts of 1951. During the debate on the former legislation the Minister of Justice defended somewhat obliquely the over-riding of provincial jurisdiction as an exercise of federal powers over trade and commerce and over defence.<sup>41</sup> The constitutional validity of these enactments was never tested in the courts and in the House of Commons in 1951 Mr. Stanley Knowles outlined concisely the ambiguities of the Canadian constitution as it related to emergency powers:







"...at the risk of getting into paths where only lawyers should tread I should like to comment on the situation that seems to be developing with respect to the constitutional basis on which we are proceeding in this country. It seems to me that there are three different bases on which we operate. We have the normal situation, although heaven knows when we are going to get back to it, when our constitution is the British North America Act. Then we have the completely abnormal situation when our effective constitution becomes the War Measures Act. Then we have this third stage which comes in between which is neither a normal time when we are governed by the British North America Act nor an abnormal time when the War Measures Act gives the federal government all the powers. We have this in-between stage when Parliament declares an emergency and gives certain powers to the federal government even though these powers may over-ride the British North America Act." <sup>42</sup>

A related uncertainty is that the courts have never authoritatively defined the limits of Section 91 (7) of the British North America Act which confers upon Parliament the exclusive authority to legislate in respect to "militia, military and naval service and defence". It is possible that this power might validly have been invoked to justify widespread federal intervention in matters normally within the jurisdiction of the provinces in support of what Bora Laskin has called "cold war federal policies in the economic field" <sup>43</sup> and, in 1951, F. R. Scott suggested tentatively that in the prolonged and perhaps permanent state of international unrest "It may be that the one word 'Defence' in Section 91 will grow to be a new residuary clause in the Constitution". <sup>44</sup> This has not in fact happened but on the basis of previous judicial decisions relating to the exercise of the federal emergency powers it seems unlikely that the courts would, except under the most unusual circumstances, challenge the federal







government's judgments that certain measures were necessary for the defence of Canada.

Devices of Adjustment: Summary and Conclusions.

In this Chapter we have used the term "devices of adjustment" to mean the procedures by which the legal-constitutional division of powers, privileges and responsibilities between the federal and provincial governments has been progressively modified. Our attention has been mainly on the period since the Second World War. In broad terms, the rapid evolution of the federal aspects of the Canadian constitutional system in the past quarter-century has been through the public policy actions of the federal and provincial governments, sometimes acting unilaterally and sometimes in collaboration, rather than through amendment or evolving pattern of judicial review. Unlike the decade of the Great Depression, the governments involved have for the most part not found the division of legislative powers as judicially interpreted an overwhelming barrier to their objectives. J. A. Corry has written perceptively of the "...political process replacing, or at any rate supplementing more extensively than in earlier years, the judicial process" in developed federal systems and he has concluded:

"The political processes have a flexibility and an easy adaptability to the dominant moods of the country that constitutional amendment and judicial interpretation both lack. There will continue to be regional aspirations which, even if they cannot have free play in a mature federalism, still have to be recognized and reckoned with. There will still be regional resistance by the people in the poorer







areas against the tribute levied on them by the metropolitan areas. All these stresses and conflicts need to be negotiated and compromised in ad hoc arrangements.

At any rate, we are likely to live for a long time with the equivocal structure called co-operative federalism. It has arisen because several separate governments share a divided responsibility for regulating a single economic and social structure. It is most unlikely that any constitution could be devised which would enable each to perform its specific functions adequately without impinging seriously on the other's. So their activities are inevitably intermingled, and co-operative arrangements must be worked out. In the result, formal powers are not coterminous with operating responsibilities; the two levels of government as well as the several state and provincial governments interpenetrate one another in many places and ways. Under the heat and pressure generated by social and economic change in the twentieth century, the distinct strata of the older federalism have begun to melt and flow into one another." 45

There is of course no assurance that "policy processes" will continue to displace amendments and judicial review as the chief procedures of constitutional evolution. It is at least possible that either the federal and some or all of the provincial governments will come to find that the existing division of legislative powers and the results of inter-governmental interactions are incompatible with their objectives and seek explicit constitutional changes. Circumstances can be visualized where private interests come more than at the present to support judicial challenges to federal and provincial legislation. Influences may grow toward making the federal constitution a more effective symbol of what are perceived to be the essential aspects of the Canadian experience. In the meantime the legal-constitutional aspects of Canadian federalism show very great resources of adaptability.







NOTES TO CHAPTER 4

1. Although this Chapter deals with the formal constitution we wish to reiterate the inextricable relation between this aspect of federalism and the ways in which the federal and provincial governments choose to wield their respective powers.
2. Debates, p. 9.
3. p. 55. ibid.
4. p. 62. ibid.
5. p. 96. ibid.
6. The way by which Quebec's consent was obtained to the 1964 amendment giving Parliament concurrent jurisdiction with the provinces in respect to survivors' benefits under the proposed Canada Pension Plan is significant. This consent was secured as part of a complex agreement between the federal and Quebec administrations involving their respective proposals for contributory pensions programmes negotiated in the aftermath of the Federal-Provincial Conference of March 31 - April 1, 1964. See the account of these events in Peter Newman, "Pension Deal Saved Confederation", The Vancouver Sun, Nov. 13, 1964.
7. See the standard text Bora Laskin, Canadian Constitutional Law, 2nd Ed., Toronto 1960. For surveys of post-war trends of judicial review see Peter H. Russell "The Court's Interpretation of the Constitution since 1949" in Politics: Canada, Ed. by Paul Fox, Toronto, 1962; pp.64-80; V. C. Macdonald, Legislative Power and the Supreme Court in the Fifties, Toronto, 1961, and issues of The Canadian Bar Review.
8. In the most exhaustive analysis of the pattern of judicial interpretation along these lines see Senate of Canada, Report on the British North America Act (1939).
9. University of Toronto Quarterly (1938), p. 144.
10. A forthcoming study undertaken for the Royal Commission on Bilingualism and Biculturalism by Professor Peter Russell of the University of Toronto will examine the nature and extent of judicial review of the constitution since 1949.
11. "Constitutional Trends and Federalism" in Evolving Canadian Federalism, A.R.M. Lower, Frank Scott et al, Durham, N.C., 1958, p. 115.
12. Revised Statutes of Canada, 1952, Cap. 11.
13. Statutes of Canada, 1958, Cap. 37.
14. For a comprehensive examination of these matters see G. V. La Forest, Disallowance and Reservation of Provincial Legislation, Ottawa, 1955.
15. Canada, House of Commons, Debates, Aug. 10, 1960, p. 7934.







NOTES TO CHAPTER 4 - continued

16. Quoted in ibid., May 5, 1961, p. 4937.
17. For an analysis of this incident, see J. R. Mallory, "The Lieutenant-Governor's Discretionary Powers: The Reservation of Bill 56" 27 Canadian Journal of Economics and Political Science, 1961, pp. 518-522.
18. For a discussion of the constitutional aspects of the spending power see Donald V. Smiley, Conditional Grants and Canadian Federalism, Canadian Tax Paper No. 32, Canadian Tax Foundation, Toronto, 1963, Chapter II.
19. (1937) A.C. 355 at 366.
20. Angers v. Minister of National Revenue (1957), Ex CR. 83.
21. Canadian Constitutional Law, 2nd Edition, Toronto, 1960, p. 655.
22. L. M. Gouin and Brooke Claxton, Legislative Expedients and Devices Adopted by the Dominion and the Provinces: A Study Prepared for the Royal Commission on Dominion-Provincial Relations, Ottawa, 1939, p. 18.
23. F. R. Scott "The Constitutional Background of the Taxation Agreements" 2 McGill Law Journal, 1955, p. 6.
24. ibid. p. 22.
25. See Chapter
26. ibid "The Constitutional Background of the Taxation Agreements".
27. For a useful compilation of what one might reasonably call "constitutional Statutes" see British North America Act and Selected Statutes, 1867-1962 Prepared and Annotated by Maurice Ollivier, Ottawa, 1962.
28. At the 1960 Federal-Provincial Conference Premier Walter R. Shaw of Prince Edward Island argued for a causeway connecting his province with the mainland on the basis of this pledge of 1873, Proceedings, p. 78.
29. For an account of this incident and its future ramifications see J. A. Maxwell "A Flexible Portion of the British North America Act," Canadian Bar Review (1933), pp. 148-157.
30. See for example the letter of Dr. Eugene Forsey to The Globe and Mail, Feb. 1964.
31. Book I - p. 251.
32. pp. 251 - 252.
33. p. 251.







NOTES TO CHAPTER 4 - continued

34. A.-G.N.S. v. A.G. Can. (1951), SCR. 31 and P.E.I. Potato Marketing Board v. H. B. Willis Inc. and A.G. Canada, 1952, 4 D.L.R., 146.
35. Revised Statutes of Canada, 1952, Cap. 6.
36. Statutes of Canada 1953-54, Cap. 59.
37. 4 D.L.R. 529.
38. The Draft Bill is reprinted in The Amendment of the Constitution of Canada, the Honourable Guy Favreau, Queen's Printer, Ottawa, 1965, Appendix 3.
39. (1923) A.C. 695.
40. 9-10 George VI. Ch. 25.
41. House of Commons Debates Sept. 11, 1950, p. 555.
42. House of Commons Debates, Feb. 23, 1951, pp. 648-649.
43. Canadian Constitutional Law, 2nd Edition, Toronto, 1961, p. 242.
44. F. R. Scott "Centralization and Decentralization in Canadian Federalism", 29 Canadian Bar Review (1951), p. 1124.
45. "Constitutional Trends and Federalism", op. cit. pp. 121-122.







## CHAPTER 5.

### FEDERAL CONDITIONAL GRANTS TO THE PROVINCES.

A conditional grant is a subsidy paid by one government to another under the circumstance that the receiving jurisdiction will expend the funds in ways deemed appropriate by the authority making the payment. In a federal system the extent and nature of conditional grants is a useful indicator of the relative strength and vigor of the central and regional governments. When the currents toward country-wide integration are running strongly we can expect grant-aided activities to proliferate and the federal authorities to be willing and able to enforce their own standards of appropriateness on the state or provincial administrations in connection with these subventions. Conversely, when the influences toward regional autonomy are strong we see resistance by these jurisdictions to the restrictions on their autonomy inherent in such a procedure. So it has been in Canada. Between 1945 and 1960 the conditional grant device assumed a central importance in federal-provincial relations, and, although provinces on occasion were dissatisfied with the way particular federal actions were taken there was, apart from Quebec, little sustained provincial concern about the over-all impact of the device and little opposition to its extension to new matters within provincial legislative jurisdiction. In a sense, federal-provincial relations had become "factored". The failure of the 1945-46 Conference on







Reconstruction to agree on a comprehensive redistribution of revenues, revenue sources and functional responsibilities gave rise to piece-meal collaboration on matters of more limited scope. However, by the early 1960s the magnitude of the grant payments, the policies of Quebec toward this procedure and the increasing vigor and administrative maturity of the provinces generally projected the conditional grant device into the forefront of federal-provincial relations.

#### CIRCUMSTANCES FAVOURING THE DEVELOPMENT OF CONDITIONAL GRANTS.

The development of conditional grant programmes in Canada has been traced elsewhere and does not need to be repeated here.<sup>1</sup> During the period from 1918 to the Great Depression several programmes were established. However, the federal Liberal party which was in power during most of this period had an ideological distaste for the procedure and, apart from the old age pension arrangements begun in 1927, failed to renew the other terminal arrangements when the agreements with the provinces expired. During the 1930s very large sums were paid by the federal government to the provinces and municipalities to assist them with the desperate problems of the Depression but these arrangements were almost all of an ad hoc nature.<sup>2</sup> It was only in the circumstances that came into being after the Second World War that the grant-in-aid device assumed a place of central importance in federal-provincial relations.

Within the English-Canadian context at least there was a developing consensus toward a more equalized







range and more equalized standards of basic public services throughout Canada. It had become a widespread belief that wide inter-provincial or inter-regional disparities in these services were indefensible and that the federal government had a moral if not a constitutional responsibility to mitigate these disparities. This point of view was usually associated with a disposition to believe that federal decisions in these matters were almost inherently better than those of the provinces and a profound lack of concern that the functions concerned were within the legislative jurisdiction of the provinces. (As we have seen, in the immediate post-war period humanitarian considerations combined with the perceived necessity to overcome deficiencies in demand as a justification for heavy federal spending on provincial matters.)<sup>3</sup> The federal government might, of course, have chosen to move against the wide disparities in the abilities of the provinces to provide services by sole reliance on unconditional subsidies based on some criteria of fiscal need. However, from a partisan-political point of view if no other this would have been an inadequate response to the very specific pressures on the federal authorities to come to the aid of particular provincial functions against the background of a growing public disposition to favour, or at least to tolerate, federal action toward country-wide equalities in respect to basic services.

Successive federal governments had in the post-war period both the disposition and the financial resources







at their disposal to respond positively to the influences described above. As we have seen, the New National Policy evolved in Ottawa between 1943 and the end of the War called for both a high degree of fiscal centralization and aggressive federal leadership in respect to a number of matters within the legislative jurisdiction of the provinces. Although provincial agreement could not be secured on the comprehensive Green Book proposals presented to the Conference on Reconstruction in 1945, the general rationale of this plan was undoubtedly the frame of reference accepted by federal elected and appointed officials in the succeeding decade and perhaps after. The conditional grant device was a useful expedient for the piecemeal accomplishment of some of the objectives of the New National Policy, particularly in respect to public assistance and health services. Also too, the distribution of the tax sources between the two levels both allowed the federal authorities to support an increasing range of provincial services within the limits of federal tax rates and budgetary surpluses or deficits believed appropriate and put a certain stringency in pressures on the provinces to receive these subsidies and meet the required conditions of eligibility.

The growth of specialization and professionalization within the federal and provincial governments saw the growth of Canada-wide groups concerned with particular public functions who pressed for greater







expenditures on these functions and for minimum standards of service in all parts of the country.

J. A. Corry has spoken of the "nationalization" of sentiment among the Canadian elites and the disposition of these groups to pursue their objectives through federal action.<sup>4</sup> So far as conditional grants are concerned, the most important of these elites were those whose working concerns were in the carrying out of particular public functions in such fields as health, public assistance, forestry, natural resource development and so on. Within these particular professional and sub-professional groups there was a high degree of consensus about the appropriate kinds of public action in regard to these activities and of course about the necessity of having more public revenues spent on them. The actual workings of conditional grant agreements insulated to some degree those who were carrying on the aided functions from the normal degrees of cabinet and treasury control and certainly from the grosser forms of partisan-political jobbery.<sup>5</sup> The increasing influence of these specialized bureaucratic elites, normally with allies outside government, worked in the same directions as did other groups within the federal administration disposed toward a leadership role in relations with the provinces and the growing consensus about the desirability of Canada-wide standards in public services.

The relatively inflexible delineation of legislative







powers between Parliament and the provinces also provided an element in the development of the conditional grant device. This delineation proved relatively resistant to evolution through constitutional amendment or changing patterns of judicial review. Thus the influences toward federal leadership evolved against a background of a relatively rigid division of the authority to make laws about particular matters. So far as these influences involved functions within the legislative jurisdiction of the provinces the federal government could respond only by such measures as the establishment of conditional grant programmes which in a formal legal sense if no other respected provincial autonomy.

#### THE INTERACTION OF FEDERAL AND PROVINCIAL PURPOSES IN THE CONDITIONAL GRANT PROGRAMMES.

It would be impossible without a detailed investigation of the establishment of each grant-in-aid to determine the specific objectives which the federal authorities were attempting to attain by such action. For purposes of analysis three kinds of federal aims can be distinguished, although these are not inherently incompatible and in most circumstances Ottawa was probably trying to pursue more than one of them.

First, the federal government may be primarily interested in securing a measure of Canada-wide uniformity in the range and standard of the public amenities which have come to be regarded as the social minimum. This presumably was the kind of motivation which prevailed in respect to hospital insurance,







pensions for the blind and the permanently and totally disabled.

Second, the federal authorities may find it impossible to discharge certain of their own responsibilities in the absence of provincial action which is not expected in the absence of federal financial inducements. This consideration prevailed when in 1960 the government radically increased its levels of contribution for vocational training facilities after the Senate Report on Manpower and Employment had shown that the labour force was deficient in skills.

Third, the federal involvement may be almost entirely on the basis of cost-sharing in an expensive provincial activity. This seems to have been the primary motivation in the enactment of the federal Unemployment Assistant Act in 1956. The Act committed the federal government to pay 50 per cent. of general social assistance cost incurred by the provinces and municipalities without serious attempts by the federal authorities to influence the standards at which such social assistance should be rendered.

A federal-provincial conditional grant programme can influence<sup>a</sup>/particular public function in three ways:

First, such an arrangement almost always encourages a higher total expenditure on the function than would have occurred in absence of the grant. However, the precise amount of the extra expenditure which is induced by the grant-in-aid cannot be accurately determined







except in those circumstances where it is almost certain that the activity would not have been undertaken in the absence of federal involvement. It is reasonable to suppose that in the more prosperous provinces the likelihood is that the service, or one like it, would have been provided anyway and the proceeds of the grant are like a windfall, whereas in the poorer jurisdiction the federal inducement triggers commitments of other provincial revenues which might in its absence have been spent on other provincial purposes.

Second, the grant-in-aid arrangement may encourage some or all of the receiving jurisdictions to undertake a function that would not otherwise have been carried on. In such cases conditional grants work toward a uniform country-wide range of services available throughout Canada. For example, it is unlikely that all the provinces would now have universal hospital insurance schemes in the absence of federal financial assistance for this purpose.

Third, the programme can induce the provinces to carry out the aided function in a way they would not have otherwise chosen. Frequently discussions of conditional grants talk about national "standards" which are brought about by this device.<sup>7</sup> This term connotes a precision which does not accurately describe the ways in which the federal authorities characteristically act to influence provincial and local action; it is quite unrealistic to believe that in most cases







anything approaching uniformity in standards of service throughout Canada can be attained through federal grants-in-aid. In some circumstances federal influence comes through requiring prior federal approval of the physical plans for capital projects or the administrative structures through which the service is rendered. In other cases, as with the health grants, federal approval is required for the object on which federal moneys are to be spent. The federal government may also try to influence provincial action by defining certain kinds of costs as shareable and others as not or by providing a higher rate of contribution toward particular costs than for others. Federal influence may also proceed through indirection by efforts to encourage training and research in respect to the aided function or through providing consultative and advisory services.

There are several constraints on the ability of the federal authorities to influence the range and standard of provincial services through the conditional grant device. The federal government is after all seeking to pursue its own objectives when it decides to embark on a shared-cost venture and it can be frustrated by the refusal of one or more of the provinces to participate; experience has shown that this participation can never be taken for granted, particularly in the case of the larger and more prosperous provinces. In most circumstances the conditions under which federal moneys







are to become available are worked out in the first instances in collaboration between the federal and provincial officials who will be responsible for the implementation of the arrangements and the former are understandably concerned to secure the future co-operation of their provincial counterparts. Once a grant-in-aid programme is in operation it is ordinarily not feasible for the federal government to refuse to make payments to a province whose actions in regard to the aided function are not in harmony with federal procedures or objectives. Because of this kind of interplay of federal and provincial influences, grant-in-aid arrangements characteristically provide for a relatively wide range of variations among provinces in respect to the aided service or facility. The growing confidence and competence in the provinces can be expected in the future to increase the influence of these jurisdictions in conditional grant programmes as in other matters. In particular, the contracting-out device which will be analyzed in the next Chapter may work so as to enhance provincial discretion in respect to existing or projected programmes where it applies by giving the provinces as an alternative to participation the opportunity of contracting out with a fiscal equivalent.

To come to definite conclusions about the impact of grants-in-aid on the provinces is impossible because to do so one would have to make judgments







about what would have happened in the absence of grants. The following points can, however, be made:

First, in some matters -- for example, civil defence, research in public health and occupational rehabilitation -- federal inducements may well have resulted in the development of activities which the provinces would otherwise have had little predisposition to undertake. In respect to the Trans-Canada Highway, roads-to-resources and some aspects at least of vocational training the federal involvement probably has given rise to activities which in a relative sense the provinces might have neglected.

Second, federal participation has resulted in the standards at which aided functions are carried on conforming more closely to those prevailing in such professional fields as social work, forestry, public health and so on than would otherwise have been the case even with equivalent provincial expenditures on these functions. In most grant-in-aid programmes there is the requirement that the physical plans for a capital project or the proposed administrative arrangements for a new grant-aided activity receive prior federal approval. This means that such matters are scrutinized by federal programme officials whose frames of reference are those prevailing in these specialized fields. As we have seen, aided activities are to a degree insulated from the partisan-political and other influences to which







provincial activities are usually subjected and federal and provincial programme officers usually co-operate to sustain this insulation. The devising and implementing of a grant-in-aid programme usually involves close and continuous collaboration between federal and provincial officials with a common professional background and gives rise to a pattern of formal and informal contacts on this professional axis.<sup>8</sup> This kind of co-operation is perhaps most influential in respect to the standards of aided services in the smaller provinces whose bureaucracies are relatively unspecialized and in which administrative activity usually takes place under relatively close partisan-political supervision.

Third, federal grants-in-aid of hospital insurance and of general and categorical public assistance go a very long way in making it possible for Canadian residents to move freely among local jurisdictions within provinces and between provinces without thereby prejudicing their access to these amenities. Left to itself, even the most liberally-minded provincial or local jurisdiction can be expected to impose residence requirements in respect to such services and the grant-in-aid programmes are effective in mitigating these restrictions. The Hospital Insurance and Diagnostic Services Act requires the participating provinces to make insured services available to residents on "uniform terms and conditions" (i.e. without local







residence requirements) and under federal leadership the provinces have been able to achieve a high degree of inter-provincial reciprocity. Statutory provisions for reciprocity are contained in the federal enactments relating to general public assistance and to pensions for the blind, the permanently and totally disabled and those persons between 65 and 69 years of age who meet the requirements of provincial means tests.

Fourth, in some provinces at least the enhancement of standards induced by federal involvement has probably taken place at the expense of functions for which no federal assistance was available.<sup>9</sup> Because "fifty-cent dollars" are available for some kinds of activities the provincial governments are often under pressure to commit more of provincially-raised revenues to these activities than they would otherwise do and consequently to deny resources to non-aided services. It is reasonable to suppose that these difficulties are more acute in the less prosperous provinces where otherwise aided functions might not have been undertaken and where action to bring these activities up to the standards required for federal reimbursement results in the depression of the standards in non-aided activities to levels more below Canada-wide averages than they would otherwise be. To take one striking example, elementary education in the Atlantic provinces may well have borne heavy disabilities because of federal grants-in-aid for other provincial programmes.

Fifth, the grant-in-aid procedure in some cases inhibits both the federal and provincial governments







from realizing precise objectives and results in a more indiscriminate expenditure of public funds than if only one jurisdiction were involved. The obstructions in the path of the federal authorities in pursuing precise aims have already been described and relate to the needs to secure the participation of the provinces. On the other hand, the participation in a grant-in-aid programme both requires the provinces to alter their expenditure priorities and to carry out the aided function in a way they might otherwise choose not to do. These restrictions on provincial discretion may not be onerous if the province is not committed either to long-range budgetary or programme planning and such has in fact been the case in most provincial jurisdictions until recently. However, if the province has formulated its objectives in these terms somewhat explicitly subsequent federal inducements to participate in shared-cost arrangements almost inherently result in these directions being altered. Unless more articulation of federal and provincial objectives is attained in respect to more comprehensive policy concerns than those affecting particular programmes, we can expect that public revenues in Canada will continue to be allocated in a less discriminating way than if each level had exclusive responsibility for particular public activities and was engaged in long-term budgetary and programme planning.







### CONDITIONAL GRANTS FROM 1960 ONWARD

Apart from Quebec neither the provinces nor the federal government from the end of the Second World War to about 1960 gave systematic attention to the general rationale of the grant-in-aid device. Professor Eric Hanson asserted in 1953 that "the conditional grant lives<sup>10</sup> healthily and lustily because we live in the short-run" and both levels apparently took up their positions in respect to grants-in-aid almost exclusively in terms of short-run considerations relating to individual functions and projects. The major focus of attention in federal-provincial relations for senior elected and appointed officials was the negotiation of the tax agreements for each five-year period and these distributions of tax sources and public revenues seem to have been made without much explicit reference to grants-in-aid. At the federal level and in most if not all of the provinces the activities of programme agencies were not closely integrated with more comprehensive plans or objectives to which the governments as such were committed.

For the first time since the Second World War the rationale of the conditional grant procedure came into high-level discussion as the issue was raised by several of the Premiers at the Federal-Provincial Conference of October 1960.<sup>11</sup> The reasons for the articulation of these accumulative dissatisfactions at this particular time can only be conjectured. The relative importance of conditional grant payments in provincial budgets had







rapidly increased from a total of \$110,974,000 or 9.75 per cent. of provincial expenditures on goods and services in 1956-57 to \$382,837,000 or 26.91 per cent. in 1959-60.<sup>12</sup> The Federal-Provincial Continuing Committee on Fiscal and Economic Matters had had conditional grants under study since its establishment in 1955 and undoubtedly its members, the senior appointed financial officers, provided their respective governments with evaluations of the grant-in-aid device which were at the same time less favourable than those of programme officials and less rooted in considerations related to particular services. The newly-elected Government in Quebec took a different policy on shared-cost programmes than had its predecessors. The Premiers expressed their concern with grants-in-aid on several grounds. Manning of Alberta criticized this device because it transferred policy discussions from the provinces to Ottawa, created financial difficulties in requiring the provinces to raise additional revenues, enforced measures of uniformity "beyond the dictates of desirability" and increased the costs of services through centralization; he recommended that conditional grants be progressively replaced by unconditional subventions on a fiscal need basis.<sup>13</sup> The Premiers of three of the less prosperous provinces -- New Brunswick,<sup>14</sup> Prince Edward Island<sup>15</sup> and Manitoba<sup>16</sup> -- criticized the grant-in-aid arrangements for not taking provincial fiscal capacity into account. Douglas of Saskatchewan spoke of the "rigidities" of these arrangements and suggested







that they be carefully reviewed with a view to converting some of them to grants which will be unconditional within specific areas of governmental activity.<sup>17</sup> Shaw of Prince Edward Island spoke

somewhat similarly of the "budgetary inflexibility" resulting from these programmes.<sup>18</sup> It was, however, the newly-elected Premier of Quebec who introduced the most novel note into the discussions by announcing a radically new policy for his province in respect to

grants-in-aid.<sup>19</sup> The traditional viewpoint of Quebec governments had been opposition to conditional grants on dogmatic constitutional grounds, although the Duplessis government and its predecessors had participated in several shared-cost programmes.<sup>20</sup>

Premier Lesage announced that his government was taking the steps necessary to accept all the conditional grants it was not then receiving, in particular those relating to hospital insurance and the Trans-Canada Highway, "on a temporary basis and without prejudice to its full

sovereignty".<sup>21</sup> He coupled this announcement with the request that the federal government cease its participation in well-established programmes with fiscal compensation to the provinces. It is significant that the Quebec leader's opposition to conditional grants was not on ideological or constitutional grounds but rather that they did not sufficiently take local conditions into account and that they "raise administrative difficulties that are the cause of a loss of efficiency or duplication







of effort and increased costs".

In the period since 1960 the major issue in the field of conditional grants has been the contracting out option which is discussed in the next Chapter. Two other developments have occurred, both of which move in the direction of making the grant-in-aid device more palatable to the provinces.

First, there are some indications that in the future conditional grants will be made for broader and less specific purposes than in the past. The composite forestry agreements concluded with the ten provinces which were in effect from 1962-64 and renewed in modified form at their expiration are a step in this direction. Under the 1962 arrangements the former agreements related to forest inventories, reforestation, forest fire protection and forest access roads were consolidated, and a new programme of stand improvement added, under the provision that a province must spend at least 40 per cent. of its total federal allotment on forest access roads.<sup>22</sup> Discussions have been taking place between the federal government and the provinces toward integrating the three grant-in-aid programmes of categorical public assistance with the agreements related to general public assistance so that with the exception of certain groups of unemployed employables the federal authorities will contribute to welfare costs without regard to the causes of the recipients' needs for such







help. The Royal Commission on Health Services whose Report has been under discussion by the federal and provincial authorities since the summer of 1964 recommended that:

"...provision be made for terminating the present pattern of health grants to provinces for specific disease categories and clients groups as each province begins to receive its Medical Services Grant.....The one exception should be the grant for Medical Rehabilitation and Crippled Children, which should be extended as an interim measure in order to implement our Recommendation... that services to crippled children be given priority." 23

There have been sporadic discussions in federal-provincial circles of the block grant alternative under which the provinces would receive subsidies on the sole condition that the federal funds be spent on broadly-defined public functions such as vocational training, public health or the development of natural resources.<sup>24</sup> The forestry agreements and the projected arrangements related to public assistance adhere to this general pattern. There are thus strong influences at work toward making federal financial assistance available for more comprehensive provincial purposes than in the past.

Second, progress has been made in rationalizing the procedures by which the provinces are reimbursed by the federal government for expenditures on aided functions.<sup>25</sup> These procedures have in the past given rise to frictions between the two levels and under the leadership of the Continuing Committee on Fiscal and Economic Matters several of these difficulties have been







eliminated.

The contracting-out procedure which is discussed in the next Chapter casts some doubts over the long-term future of conditional grants in the Canadian federal system. As we shall see, the provincial administrations other than that of Quebec have shown as yet little disposition to accept this alternative. On the other hand, it will undoubtedly require a very high degree of ingenuity on the part of federal officials to devise financial terms so that Quebec is satisfied that it is not being financially penalized for contracting out and the other provinces see no financial advantage in maintaining their participation in shared-cost arrangements.

The Tax Structure Committee established in the fall of 1964 has been charged explicitly to consider shared-cost programmes for the period 1967-72 in the broad contexts of expenditure-priorities for all governments and of comprehensive fiscal arrangements between the two levels. In the past grant-in-aid programmes have been established to meet the needs of provinces in respect to particular functions with relatively little regard for the over-all distribution of tax sources and public revenues between the federal and provincial administrations. This phase appears to be ending.

#### THE MEDICARE PROPOSAL: AN ALTERNATIVE TO CONDITIONAL GRANTS?

The proposal for federal support of provincial







medical care plans made by Prime Minister Pearson at<sup>26</sup>  
 the Federal-Provincial Conference of July 1965  
 contains a radically new departure by which the federal  
 government may both pay part of the costs of a  
 provincial service and influence certain standards of  
 performance in respect to that service. The federal  
 offer was to make a "fiscal contribution of pre-  
 determined size" to provincial medicare programmes if  
 they met the following four conditions:

First, "the scope of benefits should be, broadly  
 speaking, all the services provided by physicians, both  
 general practitioners and specialists".

Second, ".....the plan should be universal. That  
 is to say, it should cover all residents of the province  
 on uniform terms and conditions".

Third, ".....a federal contribution can properly  
 be made available only to a plan which is publicly  
 administered, either directly by the provincial govern-  
 ment or by a provincial government agency".

Fourth, ".....each provincial plan should.....  
 provide full transferability of benefits when people  
 are absent from the Province or when they move their  
 homes to another Province".

If a province would enter into a general agreement with  
 the federal authorities to establish a plan according  
 to these conditions and if provincial legislation were  
 enacted to implement this agreement the federal  
 contribution would be paid so long as these circumstances







were in effect. Although the Prime Minister did not specify the federal scale of contributions in his preliminary speech, newspaper reports have spoken of a tentative federal contribution of \$14 per capita per year to participating provinces; this is about half the current costs of the Saskatchewan plan now in operation.

The federal proposal differs in several significant respects from existing grant-in-aid programmes. There is apparently to be no provision for contracting-out and Mr. Lesage indicated at the Conference that Quebec would establish a plan conforming<sup>27</sup> in general to the federal conditions. The projected arrangement would be simple to implement once an agreement on general principles was reached and would involve none of the complexities in respect to the definition of shareable costs, reimbursement procedures and so on inherent in conditional grant programmes. Within the broad conditions of eligibility set by the federal authorities, the participating provinces would have complete freedom of action in determining the kinds and levels of services provided in their plans, the way in which provincial contributions would be raised and other matters.

Although we have not come across any serious discussion of the application of the principles in federal medical care proposals to other provincial







services, it seems likely that the successful implementation of this procedure would result in it being regarded in some quarters as an alternative to the traditional grant-in-aid device.







# NOTES TO CHAPTER 5

1. For the period prior to the Second World War see Luella Gettys, The Administration of Canadian Conditional Grants, New York, 1938. For the later period see Donald V. Smiley, Conditional Grants and Canadian Federalism, Canadian Tax Foundation, 1963, and Department of Finance, Federal-Provincial Conditional Grant and Shared-Cost Programmes, 1962, Queen's Printer, Ottawa, 1962. See also Canadian Council of Resource Ministers, An Inventory of Joint Programs and Agreements Affecting Canada's Renewable Resources, Montreal, 1964.
2. See the two studies prepared for the Royal Commission on Dominion-Provincial Relations, J. A. Corry, Difficulties of Divided Jurisdiction and A. E. Grauer, Public Assistance and Social Insurance, Ottawa, 1939.
3. Chapter Two.
4. "Constitutional Trends and Federalism" in Evolving Canadian Federalism, A. R. M. Lower, F. R. Scott, et al., Duke University Press, 1958, pp. 109-114.
5. Smiley, op cit, pp. 37-42.
6. Federal grants for training and research in the welfare field came later but these were not directly related to federal contributions toward unemployment assistance.
7. In only a few circumstances, such as those relating to the Trans-Canada Highway, do federal officials actually inspect the facility or service for which federal funds are given. The characteristic procedure is for these moneys to be paid on the basis of provincial documentation.
8. For some of the factors working toward programme collaboration see Donald V. Smiley, "Public Administration and Canadian Federalism", 7 Canadian Public Administrations, 1964, pp. 378-379.
9. In this respect see the complaints of the Premiers of New Brunswick and Prince Edward Island at the 1960 Federal-Provincial Conference. Proceedings, p. 49 and p. 75.
10. Proceedings of the Fifth Annual Conference of the Institute of Public Administration of Canada, Toronto, 1963, p. 376.
11. Proceedings, Ottawa, 1961.
12. Figures from Canadian Tax Foundation and Department of Finance, Federal-Provincial Conditional Grant and Shared-Cost Programmes, 1962, op cit.
13. p. 91.
14. p. 49.
15. p. 75.
16. pp. 54-55.







NOTES TO CHAPTER 5 - continued

17. p. 35.
18. p. 74.
19. pp. 128-129.
20. In 1959-60, the last fiscal year before the new policy came into effect, Quebec received grants-in-aid in respect to the major programmes of health grants (including hospital construction) and categorical and general public assistance but did not participate in schemes related to vocational training, roads-to-resources, hospital insurance and the Trans-Canada Highway.
21. p. 130.
22. Federal-Provincial Conditional Grant and Shared-Cost Programmes, op cit. pp. 45-46, and an Inventory of Joint Programs and Agreements Affecting Canada's Renewable Resources, op cit. pp. 161-166.
23. Report, Queen's Printer, Ottawa, 1964, pp.
24. The Government of Ontario has shown some interest in this alternative. See Mr. Robarts' statement to the November 1963 Federal-Provincial Conference, Proceedings, p. 26. For an analysis of this device see Donald V. Smiley, Federal Block Grants to the Provinces: A Realistic Alternative?, Report of the 1964 Conference, Canadian Tax Foundation, Toronto, 1965, pp. 218-222.
25. See the statement of Prime Minister Diefenbaker to the 1960 Federal-Provincial Conference, Proceedings, p. 13.
26. Opening statement, mimeo, pp. 21-27.
27. Opening Statement, pp. 22-25, Mr. Lesage spoke of the federal contributions to provincial plans being in the form of a "fiscal abatement", presumably in the personal income tax. Assuming that provincial plans conform to the four federal conditions, there seems no vital principle involved in having this compensation paid in this form or in cash subsidies or in a combination of the two.







## CHAPTER 6

### A Unique Device of Adjustment: The Contracting-out Procedure.

One of the distinctive features of the Canadian constitutional system is the differentiated pattern of relations between the individual provinces and groups of provinces and the federal government. An analysis of this differentiation was made in the last Chapter. More important as a device of adjustment is the contracting-out procedure. This device gives a new dimension to the resources of the federal system to adapt to the demands made upon it and, so far as we are aware, is unique to Canada.

Contracting-out has been used to describe two kinds of arrangements.

First, there is the situation where a province assumes the exclusive responsibility for financing and administering a programme which in some or all of the other provinces is carried on by the federal government and where there are compensating financial adjustments between the contracting-out province and the federal authorities to ensure that neither this province nor its residents are financially penalized because of this decision.

Second, there is the procedure by which a province receives some form of fiscal compensation in lieu of the federal contributions to a programme through a conditional grant arrangement.

#### The 1959 University Finance Agreement.

The original contracting-out arrangement was







concluded between the federal and Quebec governments in 1959 and related to university finance.<sup>1</sup>

In its Report to the Government of Canada in 1951 the Royal Commission on National Development in the Arts, Letters and Sciences recommended that the federal government provide annual and unconditional contributions to those institutions which were members of the National Council of Canadian Universities. According to this proposal the total sum available would be divided among the provinces in proportion to their respective populations and that within provinces the allocation to individual universities would be in proportion that their enrolments have to total provincial enrolment. The federal government responded promptly to this recommendation and in the 1951-52 fiscal year grants were provided at the rates of 50 cents per capita of total provincial population.

While the Quebec universities accepted the federal grants in 1951-52, Prime Minister Duplessis in effect ordered them to refuse the second and subsequent annual payments on the grounds that these subventions were a federal encroachment on the exclusive responsibilities of the provinces for education. Mr. Duplessis soon thereafter announced that beginning in 1954 there would be levied a provincial income tax at about 15 per cent of the federal rates and this decision was rationalized partly on the financial needs of the Quebec universities which he had insisted should not receive federal grants.







This move by the Quebec Government related university finance to the broader pattern of federal-provincial fiscal arrangements. Under these arrangements as they had existed since 1947 the residents of a province which levied a personal income tax were allowed a tax credit up to 5 per cent of the federal tax. Up until the Quebec decision this provision had not been operative as no province had levied such a tax. Mr. Duplessis demanded that the federal abatement be increased to 15 per cent which would have of course absorbed the total increased burden of the Quebec tax so far as the residents of Quebec were concerned. The result of the ensuing controversy between the federal and Quebec Governments was an increase of the federal tax abatement to 10 per cent.

In the period immediately after the increased federal abatement was established the 10 per cent tax credit more than compensated for the refusal of the Quebec universities to accept federal grants. The federal-provincial fiscal arrangements which came into effect in 1957, however, added new complications to the situation. These arrangements provided for stabilization and equalization payments to the provinces whether or not they levied individual and corporate income taxes and succession duties. Although this aspect of course favoured Quebec, which had remained out of the 1947-1952 and 1952-1957 tax agreements, that province could still complain that the new procedures did not in any way compensate for the burdens it had assumed in university







finance and that the federal per capita grants had been increased to \$1.00 in 1957 and \$1.50 in 1958 without corresponding adjustments in the rates of abatement for residents of provinces levying provincial income taxes.

In 1957 the federal government made two moves which it was hoped would induce the Quebec administration to change its policies on federal subsidies to universities. The first designated the National Conference of Canadian Universities as an intermediate disbursing agent for the per capita grants. The second measure provided that those moneys not distributed by the Conference, in effect the grants refused by Quebec universities because of the province's policy, would be held in trust for these institutions until claimed. The Quebec government did not in any way modify its position in response to these overtures.

The "thaw" in federal-Quebec relations after the death of Mr. Duplessis, and perhaps the increasing impatience of the Quebec universities under the ban on the acceptance of federal subventions, led to an agreement with the federal authorities which took effect in 1960. According to this agreement, the federal government would withdraw from the corporate income tax field to the extent of one additional percentage point in Quebec and that province would continue to assume the entire public responsibility for the financial support of its universities. It was provided that if the amount of federal grants that would otherwise have been paid in any year exceeded the proceeds of the one per cent







abatment the federal government would add this sum to the equalization grant to the province. Conversely, if the proceeds from the abatment exceeded the per capita calculation this amount would be deducted from the equalization grant. A provision of the agreement also released to the Quebec universities the moneys which had been accumulated in trust to them from 1957 onward. This contracting-out option was in 1960 enacted in an amendment to the Federal-Provincial Tax Sharing Arrangements Act and continued in 1964 legislation. Under federal law all the provinces have the same option to contract out in respect to federal support of universities but none other than Quebec has shown any disposition to do so.

The 1959 agreement was an important precedent in Canadian federalism. For the first time the shares of an important tax field occupied by both the federal and provincial governments were related explicitly to their respective responsibilities for financing a particular activity. For the first time also, a province had gained the opportunity to refrain from participation in a particular federal initiative without being subjected to financial disabilities as a consequence of this choice. Most significantly perhaps, the agreement was a clear recognition of the special place of Quebec in the Canadian federation which would lead her to resist federal encroachment in matters where such action was not perceived by the other provinces to affect their interests.







Despite the significance of the general principle established in 1959, the arrangements in respect to university finance were not directly applicable to later uses of the contracting-out device. From the time it was established in 1951 the federal per capita grant scheme was in the form of unconditional subventions to eligible institutions and the payment of these moneys was not related to the costs incurred by the universities, the maintenance of particular levels of provincial support or prescribed standards of university facilities. Thus the financial arrangements evolved for contracting-out could be made simple and their workings almost automatic. Also too, the situation was such that the agreement with Quebec could be made in relative isolation from the other provinces which was impractical in the later applications of the contracting-out device in respect of the Canada Pensions Plan and the conditional grant programmes.<sup>2</sup>

#### Contracting-Out of Conditional Grant Programmes

Up until this decade it had been accepted in Canada as in other federations that when a regional government chose not to participate in a federal grant-in-aid arrangement it would suffer the full financial penalties of this choice. The traditional Quebec position of hostility in principle to conditional grants as unwarranted federal encroachments on provincial jurisdiction did not challenge this circumstance directly. The Quebec attack on this







device was of the root-and-branch variety, the Tremblay Report regarded conditional grants as an inherent element of what it called "the new federalism", an aspect rooted in what the Report argued was the unwarranted assumption by the federal government of the power to tax and to spend as it chose.<sup>3</sup> The implications of such a position were that unless the conditional grant system was completely dismantled the Quebec Government had the unsatisfactory alternatives of either accepting the grants with the attached conditions and thus acceding in what were regarded as unconstitutional intrusions of the federal authorities or foregoing the subventions which were available to the other provinces which had no such principled objections to accepting them.

Despite its ideological position, the Quebec administration in office from 1944 to 1960 participated with the federal authorities in several conditional grant programmes. In the 1959-60 fiscal year the province received \$46,339,000 in such grants and of the major programmes it accepted payments in respect to public health activities (including hospital construction) and categorical and general public assistance while foregoing grants related to the Trans-Canada Highway, hospital insurance, vocational training, forestry activities and civil defence.<sup>4</sup> While it is impossible to calculate precisely the amount that Quebec would have received if it had chosen to participate fully in the available grants, if the grants-in-aid to Quebec in







1959-60 had borne in that year the same ratio as those received by Ontario as these did in 1961-62 when both provinces were participating in all major shared-cost programmes Quebec would have received a further  
 \$82,031,000 or \$15.60 per capita on the 1961 population.<sup>5</sup>

In 1961 the federal Liberal party committed itself to the contracting-out option in certain established conditional grant programmes. The Party's policy was thus enunciated in its 1963 election manifesto:

" If some provinces wish, they should be able to withdraw without financial loss from joint programs which involve regular expenditures by the federal government and which are well established. In such cases, Ottawa will compensate provinces for the federal share of the cost by lowering its own direct taxes and increasing equalization payments. This will be done also if some provinces do not want to take part in new joint programs that may be desirable for the federal government to initiate with the provinces.<sup>6</sup>

Contracting-out was a major topic of discussion at the Federal-Provincial Conference held in Quebec City from March 31 to April 2, 1964. The communique issued at the end of the meeting stated "It was agreed that the federal government should immediately enter into detailed discussions with provincial governments concerning contracting-out arrangements for shared-cost programmes. Such negotiations would apply to programmes which are of a permanent nature and which involve fairly regular annual expenditures." In accord with this agreement and at the initiative of the Government of Quebec representatives of the federal and provincial administrations met in Ottawa early in June to discuss







the proposed arrangements. Prime Minister Pearson in a letter to the provincial Premiers on August 15, 1964<sup>7</sup> outlined the understandings<sup>ings</sup> concluded at the June and subsequent meetings and a Resolution to embody these into legislation was introduced in the House of Commons by the Minister of Finance on December 18, 1964. The major features of Bill C-142 can be summarized briefly:

1. Applicability.

The Bill divides the arrangements to which contracting-out is to apply into "standing programs" and "special programs". The first category includes:

- hospital insurance.
- old age assistance, blind persons' allowances, disabled persons' allowances and the welfare portion of general public assistance
- health grants (excluding those for hospital construction)
- non-capital expenditures on vocational training

"Special programs" include:

- agricultural lime assistance
- the composite forestry agreements concluded with all provinces and special forestry agreements with Nova Scotia and New Brunswick
- the hospital construction programme
- the camp grounds and picnic areas programme
- the roads-to-resources programme

Excluded from contracting-out are:

- the Trans-Canada Highway
- capital grants for vocational training
- certain "research and demonstration" projects







- the "unemployed portion" of general public assistance.
- Centennial of Confederation projects.
- municipal winter works
- emergency measures
- projects under the Agricultural Rehabilitation and Development Act

## 2. The Fiscal Equivalent.

Provinces which contract out of "standing programs" receive an extra abatement on the federal personal income tax. The Bill assigns each of these arrangements a unit value corresponding presumably to the estimated percentage yields of these abatements in Quebec. The actual fiscal equivalent received by a contracting-out province and consisting of abatements with cash adjustments paid by the federal authorities will in the interim period equal the actual audited expenditures made by the province on the service.

The fiscal equivalents for "standing programs" are to be cash payments by the federal government to the non-participating provinces computed on the basis of what the relevant federal Minister assesses that these provinces would otherwise have received as conditional grants.

## 3. The Interim Arrangements.

According to the Bill, an agreement between the federal government and a province to terminate a standing programme must be concluded on or before October 31, 1965. Contracting-out of special programmes have no such time limitation and may be concluded beginning with each fiscal year







within the period of 1965-68 for hospital construction, 1965 to the end of existing agreements for roads to resources and 1965 to 1967 for other such programmes.

The agreements concluded between the federal and provincial governments in 1964 provided that during an interim period as specified for each arrangement to which contracting-out applied the non-participating province would "maintain its present obligations" in respect to the functions or services and furnish the federal authorities with audited accounts of its expenditures on these matters. It was also agreed that "a contracting-out province would, during the interim period and subsequently, continue to participate in federal-provincial bodies and meetings established for the purposes of consultation and co-ordination in fields of activity where contracting-out would<sup>8</sup> apply". In several of the programmes the interim period is to March 31, 1967, the date when the existing federal-provincial fiscal arrangements expire, and in others because of the exigencies of particular programmes it extends for a longer period.

#### Contracting-Out of Exclusively Federal Programmes.

In three circumstances apart from university finance the contracting-out principle is applied to activities







which are in the participating provinces carried out by the federal authorities without direct financial or administrative involvement of the provincial governments. All three such arrangements relate to initiatives to which the federal Liberal Party committed itself before the 1963 general election which returned it to power.

1. The Youth Allowances Programme.

The federal Liberal programme of 1963 pledged the party to "extend family allowances beyond the age of sixteen for boys and girls who remain students". The new Government moved soon after its election to provide for the paying of allowances at \$10 per month on behalf of 16 and 17-year olds still in school or university. The Quebec Government alone of the provinces had a similar programme and Prime Minister Lesage soon made it clear that this would be continued, that his administration would find the simultaneous of the two arrangements unacceptable and that a fiscal equivalent should thus be paid.

The Youth Allowances Act enacted by Parliament in the summer of 1964 provides that \$10 monthly allowances be paid on behalf of dependent 16- and 17-year olds continuing their education and of dependent youths in the same age group who because of "physical or mental infirmity" are precluded from doing so. The Act stated that such payments were not to be made on behalf of persons residing in a province which had enacted legislation providing for similar allowances prior to







the coming into effect of the federal legislation. The Fiscal Revision Act 1964 enacted at the same time made available an extra 3 per cent abatement on the personal income tax for those provinces who had youth allowance programmes similar to the federal one with the usual provisions for cash adjustments between the federal government and the contracting-out provinces of discrepancies between the yield of the abatement and the amounts paid by the provinces for this. In the period prior to the federal enactment the Quebec administration proved willing to adjust its own programme as it related to the period of the year in which the allowances would be paid and to the inclusion of disabled youths so that the terms of the provincial and federal arrangements are almost identical.

## 2. Student Loans.

The federal Liberal programme of 1963 stated "All qualified university students will be able to borrow if necessary for genuine educational needs. The fund will be independently administered. Loans will be interest-free during the period of study and for the first year afterwards, and will then be repayable, plus interest, within a reasonable time". At the Federal-Provincial Conference held in Quebec City in the spring of 1964 Prime Minister Lesage attacked the proposed plan as a federal intrusion on the exclusive jurisdiction of the provinces over education and







demanding that if it were implemented his province should receive a fiscal equivalent. As in the case of youth allowances, Quebec had its own system of university loans. The Canada Student Loans Act later enacted by Parliament provided that up to \$40,000,000 in the first year be loaned to Canadian university students by the chartered banks under the condition that the federal government should guarantee the loans and pay the interest charges while the students were in university and for six months thereafter. The Act also provided that when any province which had a student loan plan of its own informed the federal government of its desire to contract out the federal authorities would pay to that province a cash equivalent related to the federal contributions to the banks in the participating provinces and the proportion of persons in the 18-25 year old population in that province to that of persons in the same age group in the participating provinces. Only Quebec has used this option.

3. Contributory Old Age Pensions and Supplementary Benefits.

In its 1963 election manifesto the federal Liberal Party committed itself to a national contributory plan of retirement pensions and supplementary benefits. The plan was to be financed from compulsory contributions on earnings up to \$5,000 per year with employers and employees contributing equally and self-employed persons might participate if they wished. The proposed plan would also provide pensions for contributors who were







disabled before age 65 and for the widows and orphans of contributors. The party pledged that if elected it would seek agreement with the provinces to make this constitutionally possible. The plan was not to be funded, i.e. it was to be so devised as not to accumulate funds for investment purposes during the period of coming to maturity.

The newly-elected federal Government early in July 1963 introduced into the House of Commons a resolution for a national pension plan in general harmony with that promised in its election programme. Shortly thereafter, the Quebec Government demanded that the proposed federal plan should not apply to residents of that province. Prime Minister Lesage enunciated his administration's policy at the Federal-Provincial Conference held in November of that year "...we have elected to stick to the spirit of the contracting-out formula and we shall institute in Quebec a system which will be provincial, public, universal and based on actuarial hypotheses".

It is neither possible nor necessary to trace the federal-provincial negotiations about contributory pensions which went on from the summer of 1963 onward. From the first, Quebec was determined to have a plan of its own which would not only provide cash benefits to those eligible but which result in the accumulation of a large investment fund available to the province. On the other hand, in the subsequent negotiations the







Quebec administration showed some willingness to modify the details of its own plan so that the provincial and federal schemes did not impose significant restrictions on the movement of people between Quebec and other parts of Canada. Also the Quebec Government was willing to give its approval to a proposed constitutional amendment enacted in 1964 making it constitutionally possible for the federal plan to provide survivors' benefits and pensions to contributors who were disabled before the retirement age. Because of the pressure from Quebec and the other provinces the federal Government was persuaded to put its scheme on a partially funded basis so that a substantial fund would be accumulated for the purchase of provincial securities.

The federal legislation providing for the Canada Pension Plan was enacted early in 1965. The Act makes provision for its non-applicability, with minor exceptions, to residents of a province which within thirty days of the coming into force of the enactment had given the federal government notice that it intended to bring its own comparable plan into effect with contributions to begin in 1966. Only Quebec has accepted this option.

A Partial Application of Contracting-Out: The Federal-Municipal Loan Fund.

The election manifesto of the federal Liberal party in the 1963 election promised the establishment of a "Municipal Development and Loan Fund.....to provide capital for sound municipal improvements which







provincial governments approve but for which financing is at present inadequate". A resolution to implement this pledge by providing a \$400 million fund was introduced in the House of Commons in June. The reaction of the provinces to this federal initiative was for the most part hostile.<sup>9</sup> Undoubtedly the federal Government regarded the measure primarily as one to stimulate employment and also to relieve the municipalities from the high interest rates that some of them were forced to pay in undertaking necessary capital projects. Although there had been provisions in federal legislation for capital loans to municipalities from 1938 onward, the provinces were sensitive that without prior consultation the federal Government was involving itself in a much more extensive scale than before in an area where the provincial administration had a direct responsibility. Although the unfavourable provincial reactions were not confined to Quebec, that province understandably resisted the federal initiative with more vigor than did the others and on June 26, 1963 the Legislative Assembly unanimously passed a resolution declaring the federal bill to be "a serious infringement upon the exclusive jurisdiction and the autonomy of the province of Quebec". Mr. Lesage in transmitting this resolution to Prime Minister Pearson wrote, "I must add that I am sure I am expressing the unanimous feeling of the members of the Quebec Legislative Assembly when I say that they consider as a breach of your promise fully to







respect provincial rights.....the fact of proceeding unilaterally to establish a municipal loan fund, which, according to your program was to be instituted solely<sup>10</sup> in co-operation with the provinces". As a result of provincial opposition to the federal initiatives in respect to the municipal loan fund and the contributory old age pension plan a federal-provincial conference was<sup>11</sup> convened on July 26-27. At this meeting the federal Government proved willing to modify its original scheme to enlarge the scope of projects for which money might be borrowed and to divide the total amount available for loans among the provinces according to their respective populations. It was also agreed that the provinces might enter into agreements with the federal government to administer themselves their portions of the fund rather than have this function carried on by the federal agency created for the purpose. The provinces of Quebec, Ontario, Manitoba and Saskatchewan<sup>12</sup> have accepted the contracting-out alternative. The agreements resulting from the July meetings were enacted by Parliament in the Municipal Development and Loan Act which came into effect in September 1963.

#### The Significance of the Contracting-Out Device.

The various contracting-out arrangements which have evolved since 1959 are, taken together, a major institutional expression of the demands of Quebec for a larger measure of fiscal and administrative autonomy than believed vital to their interests by the other







provinces and the positive responses of the federal authorities, and to some extent of the other provinces as well, to these demands. These arrangements tend toward a situation where, in respect to the government of Quebec and the residents of that province, federal activity is, with some exceptions, confined to matters within the legislative jurisdiction of Parliament while in the rest of Canada the central government is involved in a great many matters which are under the constitution the responsibility of the province. This situation, it can reasonably be argued, is an institutional recognition of the differences between the majority in Quebec and those in the other provinces as to the appropriate role of the federal government.

Critics of the contracting-out procedure have charged that it makes less likely than otherwise the establishment and maintenance of minimum country-wide standards in respect to certain basic public services. Under the procedure as it has evolved up until the present, this argument is not compelling. In every circumstance to which contracting-out is applied Quebec is carrying on the function very much as is done elsewhere with federal involvement and in the negotiations surrounding the contributory pensions and youth allowance schemes the Quebec Government proved itself willing to modify its own plans in detail at least to bring them into harmony with those projected for the







rest of Canada. Further, as Stefan Dupre has pointed out, ".....provincial electorates themselves can be depended upon to enforce a degree of program conformity, especially where services and payments to persons are involved", <sup>13</sup> and most of the matters to which contracting-out applies are of this nature. It is also reasonable to expect that even after the interim arrangements related to the grant-in-aid programmes from which she has contracted out have expired Quebec will continue to participate in various federal-provincial and interprovincial consultative organizations concerned with these functions and this participation works toward maintaining country-wide standards.

It has also been argued that because the contracting-out device both reduces the federal share of income taxes and attenuates federal power to induce certain kinds of public expenditure that the central government's power to implement effective counter-cyclical fiscal policies is weakened. With the possible exception of the provisions relating to municipal loans, this appears not to be so. The various "standing programs" which will together make up all but a small proportion of the total fiscal equivalents concern the kinds of federal expenditures which would not except under the most unusual circumstances be altered for counter-cyclical reasons. Under the various "special programs" non-participating provinces will apparently have to carry out the functions for which fiscal equivalents are







claimed very much as is done in the other provinces. The contracting-out alternative is unavailable in respect to most of the programmes where the levels of federal contributions can feasibly be varied for counter-cyclical reasons. Most of the capital assistance programmes are excluded -- municipal winter works, the Trans-Canada Highway, assistance for the construction of hospitals and vocational training facilities and projects under the Agricultural Rehabilitation and Development Act. Neither is contracting-out applied to the "unemployment portions" of general public assistance where the levels of federal contributions can be expected to vary inversely with the prosperity of the respective provinces and municipalities. It is reasonable to argue, however, that the existing circumstances governing the Municipal Development and Loan Fund make this a less effective instrument of fiscal policy than was originally contemplated by the incumbent federal Government. By dividing the total fund available among the provinces according to their respective populations and by allowing the provinces to administer their own portions of the fund the federal power to influence income and employment may be somewhat attenuated. It would, however, be almost impossible to estimate the degree of attenuation caused by the population rule and contracting out, i.e. the extent to which each of these factors results in different loans being made or withheld than would have been the case under the original







federal plan.

It seems unlikely that the provinces other than Quebec will avail themselves of the contracting-out option. In a speech to the National Industrial Conference Board on October 22, 1964 the Prime Minister of Ontario expressed apprehensions about the effect of this device on "national standards".<sup>14</sup> Premier Duff Roblin of Manitoba in his Budget Speech to the Legislature on March 4, 1965 said of contracting-out:

"Manitoba views this new proposal with mixed feelings. We recognize particularly its threat to the continuing idea of a national standard of services and note its administrative difficulties. We shall probably not contract out ourselves and do not recommend it as a general proposition to the people of this Province. But it may, perhaps, be one practical way of easing areas of current federal-provincial friction and of reconciling the conflicting views on areas of concurrent interest and jurisdiction between the government at the center and the provinces. Through this idea of contracting-out, we may find ourselves able to meet the rather special requirements of a province like Quebec, through options open to all, even though most may have no wish or interest in invoking them. For this reason, I judge the experiment worth the very considerable risks that are attached to it and hope that it may perhaps be the seeds that will strengthen rather than weaken the bonds of Confederation."<sup>15</sup>

British Columbia has pressed for increased conditional grants on behalf of highways and natural resource development and for federal assistance for a programme of comprehensive health services.<sup>16</sup> It thus seems probable that while federal legislation extends the contracting-out option to all the provinces only Quebec will feel it appropriate to accept. This circumstance, of course, makes less difficult than otherwise the negotiations surrounding the application







of contracting-out to particular programmes and functions and in particular the calculation of the formula by which fiscal equivalents are to be given. The availability in law of this option may of course strengthen the position of the provinces other than Quebec in their relations with the federal government concerning the functions to which it applies, although it is not unlikely that in the future it will become a convention of the Canadian constitution that contracting-out is a procedure which in fact if not in law applies only to the particular requirements of Quebec.







# NOTES

1. J. Stefan Dupre has made a detailed analysis of the 1959 agreement and the nature and significance of contracting-out generally "Contracting-Out: A Funny Thing Happened on the Way to the Centennial", Report of the 1964 Conference, The Canadian Tax Foundation, Toronto, pp. 209-218.
2. The 1959 agreement provided for abatements in the corporate income tax, a tax with a variable and unpredictable yield. Future abatements were related to the personal income tax.
3. Book IV, Fourth Part, Chapter VI.
4. Federal-Provincial Conditional Grant and Shared-Cost Programmes 1962, Department of Finance, Ottawa, 1963.
5. Calculations made from figures in ibid.
6. Ottawa, 1963, pp.7-8, The New Democratic Party at its Founding Convention in the summer of 1961 gave endorsement to contracting-out on a limit basis. The Federal Program of the Party stated "Unconditional (equalization) grants must be used more frequently and should eventually replace conditional grants..... In areas affecting education, language and similar rights now in the British North America Act, where a province does not participate in a joint program it will not forego its right to equivalent funds."
7. Reprinted in House of Commons Debates, March 17, 1965, pp. 12500-12503.
8. Prime Minister Pearson's letter to the Premiers, op cit. p. 12503.
9. "Federal-Provincial Relations", The Canadian Annual Review, 1963, pp. 65-66.
10. ibid. p.66.
11. For an account of this Conference see ibid. pp.66-68.
12. First Annual Report, Municipal Development and Loan Board, Ottawa, 1964, p. 3.
13. ibid. p. 217.
14. mimeo, Toronto, p. 6.
15. Winnipeg, 1965, pp. 24-25.
16. Brief presented to the Plenary Session of the Federal-Provincial Conference, Ottawa, July 19, 1965, pp.2-5.







## CHAPTER 7.

### DEVICES OF ARTICULATION: THE INSTITUTIONS AND PROCEDURES OF CO-OPERATIVE FEDERALISM.

The term "co-operative federalism" has come to be used very frequently in Canadian political debate. Some persons, following the kind of analysis very commonly made of the American system, employ the term to emphasize the increasing importance of federal-provincial collaborative relations in contrast with the theory and practice of the older "classical federalism" in which the federal and provincial governments carried out their respective responsibilities as assigned by the constitution in relative isolation from one another.<sup>1</sup> Within the context of political debate in Quebec, co-operative federalism is defended or attacked as an alternative to separatism, the "associate states" solution and other proposals looking toward radical and explicit changes in the political relations between Quebec and the rest of Canada.<sup>2</sup> In yet another context, co-operative federalism is regarded as the successor to the centralized variant of Canadian federalism which developed during and after the Second World War, to what the Honourable Maurice Lamontagne has called "tutelary federalism".<sup>3</sup> Although there are significant differences in emphases among those who now use the term, most would probably agree that co-operative federalism embodies the following features:

First, procedures of continuous interaction between







the federal and provincial governments rather than constitutional amendment or changing patterns of judicial review are the chief devices by which a dynamic redistribution of powers, responsibilities and resources between the two levels is effected. Some of the reasons for this development have been suggested in Chapter Four. The Honourable Guy Favreau has described the new circumstances concisely, "Gone are the days when constant recourse to the courts was hurriedly made to obtain an interpretation that would finally resolve jurisdictional conflicts between the federal and provincial governments".<sup>4</sup> Under the traditions which have now evolved it would be most unusual for a dispute of fundamental importance in federal-provincial relations to be submitted for judicial determination unless after a long period of intergovernmental negotiations agreement had proved impossible and most the matters at issue between the two levels do not seem susceptible of resolution by the judiciary.<sup>5</sup>

Second, co-operative federalism embodies consultations between the federal government and the provinces prior to the federal authorities committing themselves to the details if not the substance of policies which are perceived by the provinces to affect their interests. Unilateral federal actions in such matters were common in the period immediately after the Second World War and in 1950 at the height







of federal dominance Premier T. C. Douglas of Saskatchewan presented this bill of particulars to the

Federal-Provincial Constitutional Conference of 1950:

" In the matter of marketing, the latest dominion legislation represents an abandonment by the federal government of its responsibilities with regard to international trade. Having failed to protect the Canadian producer in foreign markets, it has now thrust upon the provinces, without consultation, the responsibilities which it has failed to discharge.

Without consultation with the provinces, it is vacating the field of rental control, after permitting substantial rent increases, and thus thrusting upon the provinces the responsibility of meeting a social crisis.

Without consultation with the provinces, it has announced a comprehensive irrigation scheme, which we now learn must be supported by substantial provincial contributions.

Without consultation with the provinces, it has announced the construction of a trans-Canada highway, and it is later found that the provinces will not only have to stand fifty per cent of the cost of construction, but also the entire cost of the right of way.

Without consultation with the provinces, it has decided upon a housing program for which every province must contribute twenty-five per cent of the cost, without regard to its ability to pay.

By these unilateral decisions, the federal government has embarrassed the provinces in respect to their capital programs and has virtually dictated policies to which their consent has not been obtained. . . "







In subsequent years federal announcements of new grants-in-aid or of changes in existing conditional grant programmes were sometimes made without prior provincial consultation. Such actions understandably disturbed the provinces because their hands were to a degree forced by pressures both inside and outside their own administrations to alter their programmes and expenditures-priorities to take advantage of the federal largesse. The current understandings of co-operative federalism preclude such kinds of unilateral federal initiative, although there is no consensus about either the range of matters in respect to which such consultation should take place or the precise circumstances of such discussion. Without altering in a radical way the traditions of Canadian politics, co-operative federalism could not forestall a federal political party during an election campaign from committing itself in a broad way to certain initiatives in matters directly affecting the provinces. There seems to be no clear tradition as to whether a federal government is precluded from introducing into Parliament bills providing for activities in which the co-operation of the provinces is to be secured, although in such circumstances there is the assumption that before final parliamentary enactment the matter at hand will have been the subject of prolonged discussion with the provincial administrations. There is also no consensus as yet about the range of matters in respect







to which consultations are appropriate -- as we shall see later in this Chapter the strategy of the incumbent Quebec Government is to extend this range to include every important aspect of federal economic policies, including policies which under the constitution are within the exclusive legislative jurisdiction of Parliament. Despite these ambiguities in theory and practice, federal-provincial collaboration is now regarded as appropriate and necessary not only in respect to such matters as the marketing of agricultural products and industrial standards where under the constitution both levels have responsibilities but also in regard to policies where no such obvious sharing exists.<sup>7</sup> In recent years the provinces have vigorously asserted their right to be consulted by the federal authorities in matters of mutual concern and, although unilateral provincial action can and does complicate federal responsibilities in many circumstances, the central government has not for the most part defended its right to be consulted by the other level. However, in his opening statement to the Federal-Provincial Conference of July, 1965 Prime Minister Pearson did make such a claim:

" We cannot work together if the federal government attempts to encroach on provincial rights. Equally we cannot work together if provincial policies are directed to the erosion of federal jurisdiction and power. We have to proceed by the methods of co-operative federalism, by consultation and co-operation in all matters of mutual concern. Co-operative federalism is not a doctrine that puts all the restraints on the federal government. It







does not mean that the federal government should move only after consulting the Provinces while the Provinces accept no similar obligation on their side. Co-operative federalism does not mean that the burden of agreement rests only on the federal government while the Provinces make demands for the withdrawal of the federal government from established lines of action and responsibility." 8

Third, co-operative federalism envisages increasingly more institutionalized structures and processes of inter-governmental collaboration. There is a consensus among observers of Canadian federalism that effective collaboration in the past has been inhibited not so much by the unwillingness of federal and provincial governments to work constructively together as by their failure to evolve effective procedures for doing so. Several of the recent developments toward this end will be outlined later in this Chapter. These developments taken together provide much more institutionalized and continuous means of federal-provincial collaboration than before this decade, particularly as such collaboration involves basic fiscal and economic policies.

#### CO-OPERATIVE FEDERALISM PRIOR TO 1945.

Because almost nothing has been written about the institutions and procedures of federal-provincial collaboration prior to the 1930s, it is tempting to suggest that widespread co-operation between the two levels of government is of relatively recent origin. Recent research in the United States has, however, revealed a very large amount of federal-state







co-ordination in respect to particular matters from the earliest days of the Union onward<sup>9</sup> and it is at least possible that such investigations in Canada would show that in the earlier decades we developed a much more diluted variant of classical federalism than is commonly supposed.<sup>10</sup> The thought and practice of the 1930s, however, seem to point up that prior to the Second World War the norms of Canadian federalism were those of the federal and provincial governments carrying out their respective roles as delineated by the constitution in relative isolation from one another with changes in those roles being effected either by constitutional amendment or changing patterns of judicial review. We have not been able to discover any serious consideration during the decade of the Great Depression of the co-operative federalism alternative, the alternative of attempting, in Corry's words, "to turn the flank of constitutional obstacles" by devices of inter-governmental collaboration.

As the Depression wore on it became apparent that the institutions of Canadian federalism were inadequate to the demands facing the country. Almost unanimously, those who wished change saw the formal constitution as the "villain of the piece" and more particularly the tradition of judicial interpretation of the Judicial Committee of the Privy Council. There was a very great amount of debate on a procedure for constitutional amendment and, unlike the situation after 1945, those who supported a new procedure were clearly bent on







important substantive changes to enhance the power of the federal government. The judgments of the judiciary that the Bennett "New Deal" legislation of 1935 was ultra vires convinced most reformers, if they needed such convincing, that the traditional interpretation of the constitution failed to give the federal government the powers to deal effectively with the desperate circumstances of the times. The most elaborately formulated statement of this view was made by a Report to the Senate by its Parliamentary Counsel in March 1939 with the conclusion that the B.N.A. Act had in 1896 been "repealed by judicial legislation" and its recommendation that a constitutional amendment be enacted which would in effect direct the Judicial Committee and the Canadian courts to construe the Act in future according to the accepted canons of Anglo-Saxon judicial interpretation.<sup>11</sup>

The Report of the Royal Commission on Dominion-Provincial Relations presented to the Government of Canada in 1940 differed markedly from most of the other schemes for reform made during the previous decade in that it contemplated a solution within the existing division of legislative powers between the Dominion and the provinces. However, the Rowell-Sirois Commission was critical of the existing patterns of federal-provincial collaboration and on this basis made three major suggestions for forestalling collaborative activities between the two levels.

1. The federal government should assume the







exclusive responsibility for the relief of unemployed employables. It was in the field of public assistance more than any other that interactions between the federal and provincial authorities had during the Depression been frequent, haphazard and, for all concerned, unsatisfactory.

2. There should be a redistribution of revenue sources, revenues and functions which would permit each province, as it chose, to provide services at average Canadian standards without subjecting its residents to taxation above the Canadian average. This was the master-solution of the Report and its adoption was expected to forestall federal-provincial collaboration in respect to provincial matters on the rationale that some or all of the provinces lacked the financial resources to discharge their constitutional responsibilities.

3. There would be a procedure "by constitutional amendment if necessary" for the mutual inter-delegation of legislative powers between the Dominion and the provinces. This would permit the exclusive responsibility for particular functions to be discharged by one level or the other as an alternative to joint arrangements.

In its general distaste for co-operative federalism the Rowell-Sirois Commission appears to have been very much influenced by J. A. Corry's study "Difficulties of Divided Jurisdiction" undertaken at its direction.<sup>12</sup>







Corry studied several kinds of activity in which both the Dominion and the provinces were involved and came to the conclusion ".....Canadian experience so far seems to indicate that administrative performance in these joint activities.....falls short of the standards of reasonably good administration".<sup>13</sup> In the light of subsequent developments in the theory and practice of co-operative federalism, it is significant to see why he judged that by the efficiency criterion alone federal-provincial collaborative arrangements were almost inherently deficient:

1. Officials of different bureaucracies find both their desires to express themselves through their work and their career prospects frustrated by entering into constructive inter-governmental relations. The capable and ambitious official will try to "master the uncertainties which interfere with his control of the situation". One of these uncertainties is the actions of the officials of the other jurisdiction and he will thus strive to extend his control to all aspects of the joint activity. Further, if the official shows himself to be relatively passive in his relations with the other government he may convey to his superiors, who control his career prospects, that he has lost his originality. Conflicts in joint activities cannot thus be attributed to the "perversity of civil servants" but rather to inherent factors in such situations and are more likely than otherwise to occur when able and zealous officials are involved.







2. It is characteristic of most joint activities that federal and provincial officials will disagree on the objectives of particular public policies and the appropriate means by which these may be pursued. In his analysis of conditional grants Corry asserted, "Hope for harmonious and efficient co-operation depends largely on the discovery of clear-cut objective criteria for measuring the activity -- criteria which command agreement by their clarity. Such criteria are almost impossible to find."

3. When conflict between members of two independent bureaucracies occurs there is no hierarchical superior by whom the dispute can be expeditiously resolved. "The real advantage of unified administration is that it provides a single authority which can break a deadlock and whose very existence is a deterrent to prolonged bickering."

Thus in the period prior to the Second World War there was little disposition to try systematically to overcome the disabilities of the Canadian constitutional structure by federal-provincial collaboration. The prevailing tradition of thought visualized what were regarded as desirable changes in the roles of the two levels being effected necessarily by amendment or changing patterns of judicial review or both. In harmony with its terms of reference, the Rowell-Sirois Commission was somewhat outside this framework of analysis but the Commission rejected co-operative







federalism on the grounds that joint activities were almost inherently inefficient. The Green Book proposals presented by the federal government to the provinces at the Conference on Reconstruction in 1945 were the first co-ordinated set of recommendations for change in Canadian federalism which gave a central role to federal-provincial collaboration.

POST-WAR CANADIAN FEDERALISM: THE DOMINANCE OF  
PROGRAMME COLLABORATION.

An exhaustive account of federal-provincial relations in Canada would include a description of the very large number of formal and informal collaborative arrangements dealing with specific policies and programmes and involving on a week-to-week basis officials from both levels of government and sometimes representatives of local authorities and private institutions as well. At the more general level of policy, one would examine the activities of the Dominion Council of Health established by statute in 1919 which consists of senior appointed officials of the eleven governments and which has over the years dealt with the most fundamental questions in the health field; at the other end of the spectrum one might observe highly technical discussions between federal and provincial officials relating to the reporting of agricultural statistics or forest-fire control. Many of these interactions take place within the framework of conditional grant arrangements.







The period after the Second World War was particular<sup>ly</sup>/propitious for the development of widespread federal-provincial collaboration in respect to particular programmes and projects. The federal government had the disposition and the financial resources to involve itself in many matters within the legislative jurisdiction of the provinces. It had become a "given" of Canadian federalism that there was little prospect of constitutional adaptation through amendment or changing patterns of judicial review. The failure of the Dominion-Provincial Conferences of 1941 and 1945-46 demonstrated the impossibility of effecting a comprehensive redistribution of powers, functions and fiscal resources through agreement between the federal government and the provinces. There was little development of institutional machinery for the effective co-ordination of basic federal and provincial policies either at the ministerial level or at the level of those officials whose concerns were broader than particular programmes. In such circumstances, the federal system could adjust to the demands upon it only by piecemeal collaboration in respect to specific and relatively narrowly-defined public functions in respect to which co-operation could be secured in the absence of federal-provincial agreement on matters more comprehensive in scope.

The growth of specialization and professionalization in the federal and provincial bureaucracies







enhances the possibilities of constructive programme collaboration. Involvement in a particular function not only puts officials in possession of a common body of knowledge and techniques but characteristically commits them to common policy-preferences -- the preferences of correctional officers for rehabilitative methods, of foresters for "sustained yield management", of social workers for general rather than categorical public assistance programmes, of economists for benefit-cost analysis in decisions relating to natural resources. Such commitments, both to knowledge and to policy-preferences, are of course strengthened when all or most of the officials involved in particular functions have had a common pre-entry training. Thus, within the broad limits set by the formal constitution and the policies of their respective governments, various communities of purpose have grown up in respect to particular functions of government. These groupings in health, welfare, public assistance, technical training, resource development and so on have been of the greatest significance in aiding the federal system to adjust to the <sup>demands</sup> made upon it. What Seymour M. Lipset has said of bureaucracies generally is relevant to this kind of functional adaptation, "Inherent in bureaucratic structures is a tendency to reduce conflicts to administrative decisions by experts, and thus over time bureaucratization facilitates the removing of objects from the political arena. Constant emphasis on the need for objective criteria as a basis for the settlement of







conflicts enables bureaucracies to play major mediating roles".<sup>14</sup> In its discussion of joint activities the Rowell-Sirois Commission seriously underestimated the possibilities of harmonious and constructive federal-provincial co-operation. The argument of the Commission was that except in a few circumstances, like those involving specialized health functions, it was unlikely that the federal and provincial officials concerned could agree on criteria of action relating to these matters and that in the absence of such agreement the administration of joint activities would almost inevitably be frustrated by conflicts which could be resolved if at all only at the political level. This analysis almost completely disregarded the possibility of the development of relatively autonomous communities of officials across jurisdictional lines finding agreement on criteria much broader than purely technical considerations. In respect to conditional grant programmes particularly, there was in the period after the Second World War the growth at the federal level of groupings of programme officials concerned with the substantive aspects of activities financed by both levels and with attitudes and interests corresponding closely with those of their provincial collaborators directly responsible for the administration of those functions.

Although the week-to-week collaboration of federal and provincial officials concerned with specific functions remains an important aspect of the Canadian







federal system, the trend in the past few years has been to subsume these interactions under broader definitions of federal-provincial policies. As we shall see in the next section, this decade has been characterized by the development of institutional machinery to articulate the activities of elected and appointed officials whose concerns are more comprehensive than that of particular programmes and projects. Some of these procedures bring about more effective overhead control of programme agencies within the individual governments, others result in joint activities being more pervasively influenced by federal-provincial institutions like the Continuing Committee on Fiscal and Economic Matters and the more frequent conferences of Prime Ministers and Premiers. The federal system is thus in a period of development where adjustments to new circumstances are being effected by articulation of relatively comprehensive goals rather than as in the recent past by piecemeal adaptations to specific problems.

THE NEW DIRECTIONS OF CO-OPERATIVE FEDERALISM:  
COLLABORATION IN GENERAL POLICIES.

Federal-provincial collaboration in respect to specific programmes and projects can be distinguished from consultation and collaboration related to broader federal and provincial policies. The dominant participants in the former processes are members of programme agencies whose work is concerned with activities in such fields as public assistance, health and hospitalization, vocational training and resource development. The latter kind of activity involves







officials and agencies whose responsibilities are less particularistic -- Prime Ministers and Premiers and their staff agencies, the federal and provincial Departments of Finance and Treasuries and the agencies responsible for economic planning and development. As we have seen, the period between the end of the Second World War and about 1960 saw the dominance of programme collaboration in federal-provincial relations. The devising and implementing of these joint ventures were for the most part unrelated to each other, to broader federal and provincial objectives and to the division of tax sources between the two levels; the grant-in-aid device contributed to this kind of isolation. The periodic negotiation of the tax agreements, it is true, was a procedure by which the more fundamental political pressures on the governments could be resolved into what J. A. Corry has called "tolerable compromise". However, these interactions, at the non-technical levels of government at least, were of a somewhat sporadic nature and there was neither the will nor the institutional machinery to relate basic federal and provincial policies to each other on a continuing basis.

The development in this decade of new agencies and procedures for federal-provincial collaboration at the level of fundamental policy-making has been a response by the governments concerned to three challenges:

First, the fiscal problem has become more acute for both levels. In the decade after the Second World







War the federal government could both discharge its responsibilities for matters within its own sphere of legislative jurisdiction and progressively increase its subventions to the provinces in the forms of conditional and unconditional grants within the limits of taxation and of budgetary surpluses or deficits deemed tolerable. This circumstance seems to have ended. The provinces for their part now encounter both increasing pressures for the extension of costly services and an increasing resistance of the federal authorities to share these burdens. Thus both levels are locked into a system of financial dependency where external demands on each are converted into demands on the other.

Second, the interventionist policies of the federal and provincial governments in economic matters result in an increasing number of situations where the absence of collaboration can result in serious frustrations of the objectives of all the governments concerned. This circumstance has been analyzed in Chapter Three.

Third, there is a deepening awareness that the Canadian federal system is in crisis. So long as responsible leaders might reasonably take the continued existence of the federation for granted it was possible for the elected and senior appointed officials of both levels to regard federal-provincial relations as a relatively technical field which did not merit their sustained concern. This circumstance has now passed.

The latter six months of 1963 were a watershed in the development of federal-provincial policy collaboration.







The situation as it evolved was this: The programme of the federal Liberal party in the 1963 general election included several promises related directly or indirectly to provincial responsibilities -- promises of a contributory old age pension plan, a municipal development and loan fund, a federal-provincial medical care programme, tax concessions for industries in depressed areas, the establishment of an Economic Council, a Department of Industry and an Area Development Authority. Resolutions to implement several of these commitments were introduced into the House of Commons by the new Government at the Session which began in May, 1963. The objections of some of the provinces to federal initiatives in respect to the municipal loan fund and the contributory old age pension programme were so vigorous that a Federal-Provincial Conference of heads of governments was convened on July 26-27 at which these proposals were discussed and at which the federal authorities quickly agreed to make important changes in the municipal loan scheme. The communique issued at the end of the Conference expressed the agreement of the participants that meetings of the Prime Ministers and Premiers should be held more regularly than in the past and that it was desirable "to establish more adequate machinery for maintaining federal-provincial contacts between such meetings". The actions of the federal Government during the Conference and subsequently indicate that the federal authorities had become convinced by the







reaction of the provinces to certain of their policies that the former practice of unilateral initiatives in respect to matters about which the provinces felt a vital concern should be replaced by prior federal-provincial consultations and that more effective procedures of continuing inter-governmental collaboration were urgently needed.

At a second Federal-Provincial Conference held on Nov. 26-29, 1963 the topic of "continuing federal-provincial liaison arrangements" was on the agenda. Unlike the practice at previous such meetings, it was agreed that this Conference was to be the first in a series of gatherings and it was decided to reconvene early in the next year. The Conference also agreed that the following joint investigations should be undertaken:

1. A joint study at the official level was to be made of fiscal arrangements and shared-cost programmes and the relations between the two.

2. The federal and provincial Ministers of Agriculture were to examine "proposals to permit the Canada-Wide operation of agricultural marketing boards".

3. Discussions on contributory old age pensions were to continue.

4. There was to be an early meeting of the Ministers of Health to discuss hospital costs and other health matters.

5. A federal-provincial working group was to examine the joint operation of welfare programmes prior to







further discussions by the relevant Ministers.

6. There was to be a conference at the ministerial level to discuss Indian affairs in May 1964.

The two Conferences of 1963 thus presaged the new circumstances of co-operative federalism in which the Prime Ministers and Premiers were more deeply and continuously involved in federal-provincial relations than before and in which these leaders would meet at relatively short intervals to review matters of mutual concern and to charge more specialized groups at the ministerial and official levels with inquiring into and reporting on particular policies and programmes. It had become apparent at the highest political levels in Ottawa and in most if not all of the provincial capitols that such relations were of crucial importance to the effective governing of these jurisdictions and even to the continued existence of the Canadian federation itself.

The policies of the federal government in the period after the crucial events of the latter months of 1963 have showed the new directions in which co-operative federalism has moved:

1. After some initial disputes about the matter, the federal government has consulted with the provinces in the designation of areas of low employment where industries would be given special tax incentives and development grants.

2. The federal statute of 1963 establishing the







Economic Council of Canada requires that body in carrying out its responsibilities to "seek full and regular consultations with appropriate agencies of the governments of the several Provinces".

3. In respect to a matter where there had been several unilateral federal initiatives in the past, Prime Minister Pearson offered at the Conference of November 1963 to cause to be increased the maximum payments in which the federal authorities would share in the three categorical public assistance programmes and the maximum incomes of applicants permitted if the provinces would agree to these measures.

4. The federal contributory old age pension programme was under continuous discussion with the provinces from July 1963 until its enactment by Parliament in March 1965.

5. The federal government sponsored a meeting with the provinces at the ministerial level a month after the Royal Commission on Health Services presented its Report in the summer of 1964 and before the federal authorities had announced their own responses to its recommendations.

6. Early in 1964 the federal Minister of Trade and Commerce convened a meeting of provincial Ministers to invite them to give their views on trade policies and to discuss measures for the co-ordination of federal and provincial policies in these matters.

7. Detailed discussions regarding contracting-out







took place in the spring and summer of 1964 and led to an agreement on this procedure.

The Speech from the Throne read to Parliament on April 5, 1965 contained several references to new federal initiatives in economic and social policy to be undertaken in collaboration with the provinces.<sup>15</sup> It was announced that after further consultations with the provinces there would be implemented a Canada assistance plan for the federal sharing in the costs of comprehensive provincial programmes based on needs regardless of the circumstances which occasioned such needs. The government committed itself to a programme "for the full utilization of our human resources and the elimination of poverty among our people" and announced its intention to convene a federal-provincial conference in this connection. The federal area development programme was to be expanded after consultation with the provinces. There were to be more aggressive federal policies to assist workers displaced by automation, measures to be taken in collaboration with labour and management and "where appropriate in conjunction with the provinces". Further federal-provincial meetings were to be held for the purpose of evolving measures so that all Canadians would receive the health services they needed regardless of their individual ability to pay. The Speech from the Throne also suggested new federal policies related to major agricultural products to be evolved in







co-operation with the provinces. The general direction of federal action in social and economic policies was thus toward a more precise definition of objectives than in the past, a definition which would assist those individuals, areas and groups who had been to a greater or lesser degree by-passed in the general circumstances of prosperity which prevailed since the Second World War. This more selective approach inevitably involved a very high degree of federal-provincial articulation if the federal objectives were to be successfully pursued.

#### PROCEDURES AND INSTITUTIONS OF FEDERAL-PROVINCIAL COLLABORATION.

During the past five years the federal government and those of several of the provinces have developed new agencies for dealing with federal-provincial relations at the level of basic policy. These internal changes exemplify the increasingly important roles of the Prime Ministers and Premiers and their staff agencies and of the elected and senior appointed financial officials in the interactions between the federal and provincial administrations. Although from the 1930s onward students of Canadian federalism have recommended more institutionalized machinery for federal-provincial relations, the governments concerned showed little urgency to move in this direction and, as we have seen, these relations were until this decade dominated by isolated patterns of collaboration in particular programmes and functions and by the periodic negotiation of the tax agreements. The new developments







represent the prevalent conviction that federal-provincial relations are now too important to be left to the technicians. A brief account of the development of institutional machinery in the federal and the Quebec and Ontario governments demonstrates the organizational response to the new circumstances: Federal Government.

A small Federal-Provincial Relations Division was established in the Department of Finance in 1954. The Division became responsible for the implementation of the fiscal agreements with the provinces, acted as a Secretariat for the Federal-Provincial Continuing Committee on Fiscal and Economic Matters and was given other operating responsibilities in the same general field. In the past two years much more elaborate machinery has come into existence:

- early in 1964 a small Federal-Provincial Secretariat was established in the Privy Council office under the direct supervision of the Clerk of the Privy Council. This agency provides secretariat services for federal-provincial conferences of Prime Ministers and Premiers and for Cabinet and other interdepartmental committees dealing with such matters. It is also directed to

"keep in touch with, review, and bring to the attention of the Prime Minister, Ministers or departments any aspects or implications of present or proposed government policies which would be of interest or concern to the governments of the provinces, or which might affect in other ways federal relations with the provinces".

The Secretariat is also charged with providing/"a the provinces with







central point of contact with the federal government at the official level".

- in the summer of 1964 Mr. A. W. Johnson resigned as Deputy Provincial Treasurer of Saskatchewan to become Assistant Deputy Minister of Finance with his major responsibilities in the field of federal-provincial fiscal relations and a strategic role as Secretary of the Tax Structure Committee.

- Mr. Tom Kent, the Co-ordinator of Programming in the Prime Minister's office, and along with the Clerk of the Privy Council the senior appointed policy advisor to Mr. Pearson, has been deeply involved in federal-provincial matters and under the direct supervision of the Prime Minister has assembled a secretariat in connection with the federal "war on poverty" programme.

The federal machinery is in process of rapid evolution and co-ordination at the official level takes place through a Cabinet committee and a committee of senior appointed officials with representatives from the Prime Minister's and Privy Council offices and the Department of Finance and from other Departments when matters concerning them are under discussion.

Two other federally-appointed groups concerned with basic fiscal and economic policies have also engaged in consultative relations with counterpart provincial agencies:

- the Economic Council of Canada has under its statutory terms of reference consulted with







corresponding councils for economic planning and development appointed by the provinces.

- the federal Royal Commission on Taxation has been in close touch with counterpart commissions on fiscal matters established by most of the provincial governments.

#### Quebec.

A Department of Federal-Provincial Affairs was established in 1961. Prime Minister Lesage has been Minister of the Department since its creation. His Deputy, Mr. Claude Morin, has played a strategic role in policy relations with the federal government and in inter-governmental groups dealing with various aspects of federal-provincial matters.<sup>16</sup>

#### Ontario.

A small research group, the Intergovernmental Relations Branch, was a part of the Department of Economics established by statute in 1956. In 1956 this Branch was transferred to the Treasury Department and came to be known as the Research and Statistics Branch with responsibilities in respect to federal-provincial and provincial-local financial relations and for preparing the government's annual budget statement. A major change was made in 1965 with the appointment of Mr. Ian Macdonald as Chief Economist of the Department of Economics and Development with major responsibilities for co-ordinating research in federal-provincial relations and as a senior policy advisor to the government of Ontario in this field.<sup>17</sup>







The influences toward more institutionalized procedures for federal-provincial collaboration is reflected in the number of conferences between officials of the two levels:

Federal-Provincial Conferences Held -  
April 15, 1963 to October, 1964 18

<u>Federal Department or Agency</u>	<u>Number of Ministerial Conferences</u>	<u>Number of Official-Level Conferences</u>
Agriculture (including Agriculture and Rural Development Administration)	1	8
Citizenship and Immigration	1	0
Finance	1	4
Fisheries	1	0
Forestry	1	1
Industry	3	0
Justice	1	0
Labour	1	1
Mines and Technical Surveys	2	20
National Health and Welfare	2	22
Northern Affairs and Natural Resources	0	4
Privy Council Office	5	0
Centennial Commission	5	1
Trade and Commerce	1	10
	<hr/>	<hr/>
	25	71
	<hr/>	<hr/>







19

Federal-Provincial Groups Scheduled to Meet in 1965.

<u>Federal Department or Agency</u>	<u>Number of Ministerial Conferences</u>	<u>Number of Official-Level Conferences</u>
Agriculture	1	13
Centennial Committees	2	
Citizenship and Immigration	0	8
Civil Service Commission	0	1
Economic Council	0	1
Emergency Measures	1	2
External Affairs		1
Finance	2	3
Fisheries	0	5
Forestry	1	4
Health and Welfare	1	20
Labour	0	8
Lines/Technical Surveys	0	4
Northern Affairs/Natural Resources	1	9
Privy Council Office	1	1
Public Works	0	6
Secretary of State	0	1
Bureau of Statistics	0	12
National Revenue	0	1
Trade and Industry	1	1
Transport	0	6
	<u>11</u>	<u>107</u>

Of the official-level groups, 74 included representatives of the federal government and of all the provinces, 33 were constituted to exclude one or more of the provinces.

The informal and ad hoc nature of many of the interactions between the federal and provincial governments make it







necessary to interpret the tables given above with great caution. In some cases undoubtedly, informal day-to-day relations between the officials of the governments involved are of more significance than formal conferences in co-ordinating the activities of the two levels. The figures also tell nothing about the intra-governmental relations between programme agencies and elected and appointed officials having more comprehensive concerns. However, the evidence indicates that the frequency of formal and informal federal-provincial interactions is increasing and that these interactions come more and more to involve basic matters of public policy.

In the past decade the need for increasingly effective collaboration between the two levels in respect to fiscal and economic matters has been recognized. The Federal-Provincial Conference of 1955 provided for the establishment of what came to be called the Federal-Provincial Continuing Committee on Fiscal and Economic Matters composed of the senior appointed financial officers of these governments.<sup>20</sup> The Chairman of this Committee which meets at least twice a year is the federal Deputy Minister of Finance. The work of this group has involved for the most part the fiscal relations between the two levels, although there has been some discussion of the general economic situation as seen by the officials involved. The Committee has no corporate responsibilities and its







members report directly to their respective governments.

The establishment of the Tax Structure Committee in October 1964 represented a more ambitious effort than ever before to co-ordinate federal and provincial objectives in basic fiscal and economic policies.<sup>21</sup>

The Committee is chaired by the federal Minister of Finance and has as its members two other federal Cabinet Ministers and the Treasurers or Ministers of Finance of the provinces. The Committee is directed to report to the Federal-Provincial Conference which established it early in 1966 on the following matters:

- " 1. Trends to be expected during 1967-72 by the federal government, the provinces and the municipalities, taking into account the broad priorities likely to be accorded by governments to expenditures on major programmes that will compete for available funds.
2. The problems involved in financing these expenditures and their relationship to the economic circumstances to be expected, the probable levels of costs of public services and facilities, and the prospective levels of government debt.
3. The general policy to be followed in respect of shared-cost programmes during the period 1967-72.
4. The tax fields that should be used exclusively by the Federal Government and by the provinces and municipalities, and the fields in which joint occupancy is desirable.
5. The arrangements to be made in respect of jointly-occupied tax fields.
6. The relation of equalization grants to the fiscal arrangements and fiscal capacities of the provinces, and the best equalization arrangements for the period 1967-72.
7. Future intergovernmental liaison on fiscal and economic matters.
8. Other related matters. "







The Committee on its establishment agreed upon the nature of the studies which "should be undertaken to facilitate its work" and devolved upon the Continuing Committee on Fiscal and Economic Matters the general direction of these studies and "the working out of the assumptions and methods to be used in those studies requiring a common basis of approach".

The work of the Tax Structure Committee is obviously of the greatest potential significance for the future development of Canadian federalism. It is important to note that the Committee is corporately charged to report back on the matters assigned to it for investigation to the Federal-Provincial Conference of Prime Ministers and Premiers. There is the assumption that its work will proceed through sophisticated study and argumentation by those involved. The matters with which it is dealing, particularly that of the expenditure-priorities to be given to various public functions, projects it in the middle of the most crucial policy areas with which governments must deal. The establishment of this Committee constitutes a radically new departure in the development of federal institutions in Canada if not in the history of federalism throughout the Western World.

#### POLICY CONFLICTS IN FEDERAL-PROVINCIAL RELATIONS.

The federal system must, if it is to survive,







evolve procedures for bringing about tolerable compromises in matters where the interests of the federal authorities and those of one or more of the provinces conflict. The most intractable of these conflicts are "real" in the sense that they are for the most part imposed by the differing responsibilities that federal and provincial officials have respectively assumed and cannot be wished away by incantations against the alleged irrationalities or perversities of these men. More than at any time since Confederation, the federal government and the provinces now confront each other in areas of public activity where each has explicitly formulated policies and more than in the past each is able to frustrate the other. On the basis of past events and current developments federal-provincial disagreement may be expected in respect to such matters as these:

1. The policies of the federal government and the provinces may differ in respect to the appropriate degree of the mobility of labour and capital within Canada and public policies encouraging or limiting such mobility.
2. In some cases provinces may desire closer integration with contiguous areas of the United States than is compatible with the economic objectives of the federal government.
3. Some of the provinces and the federal government may put different priorities on economic development as against price stability.







4. In respect to certain kinds of capital expenditures the primary concern of the federal government may be the impact on employment and income where the provinces are chiefly concerned with the service needs for roads, schools, hospitals and other amenities and, in some cases, with the continuing financial stability of local authorities who borrow to make such expenditures.

5. Some of the provinces may work toward the development of more autonomous provincial or regional economies than are deemed consistent with federal objectives.

6. The federal government and the provinces may differ on the degree of inter-provincial or inter-regional equalization it is possible or desirable to effect and the appropriate federal measures to be implemented to this end.

7. The federal government and the provinces may differ about particular federal measures which benefit some areas but where other areas are either not helped or adversely affected by such measures.

8. Provinces may wish to enter into patterns of trade, investment and other relations with foreign nations inconsistent with economic or non-economic objectives of the federal government.

9. Federal policies for economic development in areas where income and employment is low may conflict with provincial regional development plans.

The issues outlined above relate for the most part to







economic direction and control and, as we have seen, the increasing interventionism of the provinces in these matters has brought about a new series of complications in federal-provincial relations. It is, however, the fiscal problem which is likely to be in the next few years as in the past the source of most contention in Canadian federalism.

Fiscal relations constitute the most difficult issue in federal-provincial affairs and the one which in the past has proved least susceptible of resolution satisfactory to those governments concerned. The issue is usually framed in terms of (a) the relative shares of the personal and corporate income tax and succession duty fields occupied by the two levels; (b) the amounts and kinds of federal unconditional subventions to the provinces. Although the fiscal problem in its various forms has been a source of contention between the federal government and the provinces from Confederation onward, it can reasonably be argued that the present conflict and the ways with which it is dealt are now more crucial to the stability if not the continued existence of the Canadian federal system than ever before. The most lucrative fields of taxation are occupied by both levels. The federal government has assumed increasing responsibility for equalization both among provinces and regions as such and among individuals wherever in Canada they reside. The ways in which public moneys are raised and spent are perceived to have an important







impact on economic stability and growth and like other national administrations the government of Canada has accepted the primary responsibilities in this regard. Demands for the most costly services that modern governments provide relate for the most part to matters within provincial rather than federal jurisdiction. The comprehensive programme of reform undertaken by the Quebec government elected in 1960 is extraordinarily costly and the most insistent demands of this administration are framed in fiscal terms. These are some of the basic complexities which together constitute the fiscal problem of the 1960s.

Although the provinces and the federal government in the post-war period have usually conducted their disagreements about fiscal matters in terms of access to tax sources and of the distribution of public revenues, it can reasonably be claimed that what is now really at stake is the relative priorities in expenditures to be given to the responsibilities borne by each level. Jacques Parizeau's analysis of the priority-crisis is so lucid that it deserves to be quoted at length:

" Among the very numerous questions that can be raised with respect to fiscal arrangements, one is very basic and should be clarified at the outset. It has to do with the sharing of total fiscal resources between the two levels of government. It is also the most difficult to solve either properly or permanently. As a matter of fact, it cannot be solved before the two levels of government have decided how much to spend in each of the sectors they deal with.







One should emphasize here that whatever the Constitution has to say about the fields of competence of the two levels of government, it is in this respect of no help at all. That the federal authorities have exclusive jurisdiction over foreign affairs, while the provinces have exclusive jurisdiction over roads, is of no real interest as long as we don't know how much we expect to spend on foreign aid and how long we want to let the motorist remain entangled in traffic jams.

.....

It is a typical characteristic of a federal system that the establishment of priorities is an exceedingly difficult task. In effect, each level of government can determine priorities independently of the other. Both can sink rapidly in the red, and then when deficits have reached a certain level, fight for some time over the sharing of fiscal resources. This quarrel over taxation fields is spectacular and eventually attracts most of the attention. It should not, however, distract from this fundamental fact that the root of the difficulty lies with priorities for expenses that have not been settled. There might be important principles involved in the division of spending powers between the governments and the apportionment of resources between fields of expenses. Thus, essential philosophical or social principles are involved in the sharing of public funds between education, social security and national defence. A whole body of doctrines is also involved in reserving education to the provinces or in giving to them full responsibility for regional development. Similarly, essential political vision has always been deeply embedded in the transportation and communication policies of the federal government.

Sharing taxes and reserving or splitting fiscal resources are not similarly coloured by such broad considerations. A sharing arrangement is good, efficient and acceptable only so long as it allows both levels of government to meet their expenses. If at any time the balance of expense shifts, there is no other way out than to shift also the sharing arrangement of taxes. In short, and as an example, it may be that exclusive provincial jurisdiction over education is the only course available to preserve French culture in North America, but there is nothing in excise taxes which preserves anything for any one except money."







constitutes the first effort in Canadian history to resolve the fiscal problem explicitly in terms of the expenditure priorities of the two levels of government. It is, of course, too early to evaluate the possibilities of success for this group.

#### INTER-PROVINCIAL RELATIONS.

There has been little study of inter-provincial relations in Canada.<sup>24</sup> There are apparently many instances of such co-operation at the middle and lower levels of the provincial administrative hierarchies, most of it of an ad hoc and informal variety. Since the beginning of the annual Premiers' conferences in 1960, however, the provincial leaders have had a forum in which problems of common interest can be discussed.

In his opening address to the 1960 Federal-Provincial Conference Prime Minister Lesage asserted that "the provinces have with one another an increasing number of common problems that they could profitably study together and also, we hope, solve together".<sup>25</sup> Because of this, the Quebec government would give an early invitation to the Premiers to convene to study these problems and to decide whether it would be appropriate to "establish inter-provincial relations on a permanent basis". The Quebec hope was that this invitation would be accepted and that in the future "the provinces will be able to prepare, at first in collaboration with one another and then in collaboration with the Federal Government, long term solutions which, while effectively settling problems,







will also maintain the balance in our federation". The first interprovincial conference met on Dec. 1-2, 1960 and in succeeding years meetings have been held in different provinces each August. Prime Minister Diefenbaker was invited to attend the first conference but declined to do so and the communique at the end of this gathering expressed the hope that a federal Cabinet Minister might be sent. However, at the first and succeeding meetings the federal government has sent appointed officials as observers, up until 1963 the Head of the Federal-Provincial Relations Division of the Department of Finance and in 1964 the Assistant Deputy Minister of Finance whose chief responsibilities are with federal-provincial fiscal relations and the Head of the Federal-Provincial Secretariat in the Privy Council Office.

The Premiers' Conferences are held in private and it is possible to discover the topics under discussion over the years only through newspaper reports and the brief communiques issued at the end of each meeting. Some of the matters under review have been the financing of schools and hospitals, the co-ordination of retail sales, tax collections, projects for the Canada Centennial celebration, provincial policies in giving preference to provincial firms in bidding for government contracts, Indian affairs, off-shore mineral rights, uniform regulations for motor vehicle insurance and a reciprocal recognition of truck licenses and the co-ordination of educational standards and curricula.







Two projects of considerable significance have come out of the Premiers' conferences:

First, at the 1963 meeting in Halifax the Premiers approved in principle a proposal for the interchange of civil servants among provinces. This proposal originated with the Institute of Public Administration of Canada and is to be implemented by the provinces in co-operation with that organization.

Second, in January 1963 representatives of all the provinces except Newfoundland, Prince Edward Island and New Brunswick met with federal officials in Toronto to discuss the possibilities of uniform provincial legislation relating to private pensions plans. The communique issued at the end of the conference revealed that "general technical agreement" among the provinces participating had been reached in respect to their future pensions legislation; those matters related to the solvency of private pensions funds, provisions for vesting and the locking-in of employee contributions and reciprocal agreements so that the registration, inspection and audit of each private plan could be carried out within only one province.

The Premiers' meetings are very informal. In contrast with Federal-Provincial Conferences of the heads of government the provincial leaders generally attend with not more than two or three advisors each.

26 Despite what appears to have been the original hopes of the Government of Quebec, there appears to have been a profound reluctance on the







part of the provinces to come to an agreement on or even to discuss matters of federal-provincial concern or to try to reach provincial consensus on these matters for future discussion with the federal authorities. Neither has Quebec been able to find support for the establishment of more formal inter-provincial machinery. These meetings have undoubtedly provided a useful forum for discussion among the Premiers and a means for reaching agreement on limited matters of mutual concern but it is unlikely in the foreseeable future that the major inter-governmental decisions in Canadian federalism will be removed from the framework of federal-provincial relations.

#### CO-OPERATIVE FEDERALISM AND THE NEW QUEBEC

The directions taken by the Quebec Government which came to power in 1960 have been of crucial importance in the development of co-operative federalism. For the first time in the history of the province there is an administration in office which is determined to use the powers of government in an aggressive and sophisticated way to pursue what it interprets as the interests of French-Canada.<sup>27</sup> This circumstance imposes a demand on Canadian federal institutions to which they have never been subjected before and raises quite a new set of issues in the political relations between the French and English-speaking cultural groups. The defence







of provincial autonomy has very different dimensions in Quebec or elsewhere when the provinces concerned pursue interventionist policies over a broad range of social, cultural and economic matters than when the scope of provincial action was a narrow one. This section deals first with the substantive demands on the federal system made by the Government of Quebec and then with the strategies that this administration has evolved in pursuing its objectives.

There are pressures in four directions for an increased range of provincial autonomy put forward by the new Quebec:

First, there is the demand that the federal authorities cease their involvement in matters within the legislative jurisdiction of the provinces as defined by the constitution. Prime Minister Lesage gave this rationale for his government's policies at the Federal-Provincial Conference of November 1963:

".....we must exercise constant vigilance. Nobody in Quebec believes that a given measure -- aid to municipalities, the contributory pensions programme, or federal aid to technical education, for example -- can, in itself, lead French-Canada to assimilation by the English-speaking majority. Nor does anyone believe that any one of these measures, taken simply, is of a nature to threaten our entire cultural heritage. However, we must be systematically opposed to any federal move, whatever it may be, that reduces, in fact, or attacks the field of provincial jurisdiction. We absolutely cannot, even if it concerns a question which appears to be only a secondary one, remain passive in the face of federal initiatives which we judge to be detrimental to the exercise of powers entrusted to the provinces. In fact, it is the whole of the measures that must







be considered, and it is against each of the items comprising the whole that we must be opposed, because each item is a threat to the autonomy of the provinces, a threat which constitutes a precedent which is later on invoked to justify further threats of increasingly detrimental effect." 28

The contracting-out procedure which was analyzed in Chapter Five goes a very long way in meeting Quebec's demands for autonomy. In respect to all exercises of federal power in matters within the legislative jurisdictions of the provinces or where provincial interests are perceived to be directly involved the incumbent Quebec administration has been vigorous. 29

Second, Quebec has pressed both for an increased share of the direct tax fields and for higher federal unconditional grants. The programme of reform to which the province is committed is very expensive. Between 1955 and 1965 Quebec's expenditures increased 270 per cent., more than that of any other province; in the earlier years per capita expenditures in the province were lower than anywhere else in Canada, in 1965 it is estimated that they will be higher than in any province except Saskatchewan.

Third, the Quebec government has demanded that it be consulted in respect to important federal economic policies. At the Federal-Provincial Conference in November 1963 Prime Minister Lesage asserted:

"....the provinces should always be consulted by the federal government each time the latter wishes to effect policies which could have a repercussion on the economy of the provinces. Actually there are few economic problems which are exclusively







federal in their bearing. Economic policy measures almost always influence the provinces. Consequently, the provinces can no longer be satisfied with a passive role in such matters, nor can they resign themselves to suffer the consequences of unexpected arbitrary federal decisions in which they have had no voice." 30

Mr. Lesage more specifically demanded that the provinces "should have their voice in determining tariff structures, transportation and even the monetary policies of Canada" and that this should come through participation in "permanent Federal-Provincial organisms instituted for this purpose". The increasing involvement of the Quebec government in economic direction and control brings about a very large number of situations in which provincial objectives can be frustrated by the inappropriate policies or actions of the federal government. Out of this circumstance has come the Quebec assertion to be consulted by the federal authorities in respect to a very broad range of matters.

Fourth, the Quebec government has demanded that it be able to conclude international agreements without the control of the federal government in respect to matters within the legislative jurisdiction of the provinces. According to the theory of the constitution advanced by the Quebec Minister of Education "une federation comme le Canada possede une double personnalite (internationale), l'une emanant des domaines ou le federal est competent, l'autre des domaines que la constitution designe comme provinciale". 31

From a practical point of view the right of Quebec to







conclude international agreements was necessary because:

"....nos ententes internationales doivent répondre aux besoins du Québec et aux priorités que celui-ci s'est fixées dans les domaines de sa compétence. Or, c'est nous qui avons la responsabilité d'identifier ces besoins et d'établir ces priorités. Le gouvernement d'Ottawa, dont ce n'est pas le rôle constitutionnel, est inapte à porter de tels jugements.....le gouvernement fédéral du Canada s'est montré incapable d'établir un contact étroit entre l'étranger et la communauté canadienne-française. Pour des raisons démographiques et historiques, le gouvernement fédéral représente une entité plus anglophone que francophone. La situation géographique de notre pays, les liens économiques étroits qui l'unissent à son puissant voisin du sud, sa participation soutenue aux activités du Commonwealth contribuent à orienter son action politique plus naturellement en fonction des préoccupations du monde anglo-saxon. Aussi est-ce surtout pour le seul gouvernement francophone d'Amérique continentale, celui du Québec, que l'on peut établir un contact réel et fécond avec sa collectivité qu'il représente." 32

The context of the Quebec demand that institutional recognition be given to its "personnalité internationale" has been that of agreements relating to education and cultural matters, subjects which are for the most part within the exclusive jurisdiction of the provinces.

The Quebec Government has acted on the assumption that its substantive objectives in federal-provincial relations could best be pursued through the institutionalization of intergovernmental collaboration. As we have seen, Mr. Lesage at the 1963 Conference requested that there be established machinery by which the provinces might participate in the framing of federal transportation, tariff, and "even" monetary policy; in this connection one of the government's influential advisers, Professor Jacques Parizeau, has suggested that the Board of the Bank of







Canada be made up of official appointees of the federal government and the provinces and that a federal-provincial consultative committee on commercial policy be created, presumably to advise both the federal government and the Tariff Board.<sup>33</sup>

At the July 1960 Federal-Provincial Conference and on several occasions thereafter Quebec has proposed a permanent Federal-Provincial Secretariat financed and controlled by the two levels to "establish inter-governmental relations on a permanent and continuous basis". At the same gathering Prime Minister Lesage proposed new and more institutionalized machinery for conducting inter-provincial relations. The Quebec government has had a predilection for "co-operation at the summit" and has had some suspicion of the growth of functional relations between the two levels in the absence of effective procedures of articulation in basic policy matters. This kind of analysis was lucidly made by F. A. Angers in his comments on the creation of the Quebec Department of Federal-Provincial relations in 1961:

" The coming into being of such a Department will, without doubt, give an altogether new character to relations between the Quebec Government and the government at Ottawa and of the other provinces. Up to now, it was on the technical level that co-operation was established out of necessity between the different provinces. Within the limits of a more or less clearly defined policy according to each case, the superior officers and expert technicians of the various departments concerned correspond among themselves and meet in conference to determine standards or establish rules to co-ordinate efforts, whenever such steps are deemed necessary. In many instances, when a well-defined policy is







"not dictated by the governments themselves, it is these officers and technicians who, for all practical purposes, frame policy. In these circumstances there is always the risk of the policy being drawn up to meet urgent needs or to satisfy purely administrative considerations. Lacking more precise ideas, the Minister automatically ratifies the decisions taken by his officers. From now on, a Minister and a qualified staff will examine the policy-making aspects of inter-governmental relations in Canada. They will see that problems are faced as a consequence of principles or rules of policy. They will have technicians implementing provincial policy rather than abandoning policy to technical considerations." 34

The Department of which Professor Angers was speaking is an institutional recognition of Quebec distrust for piecemeal functional relations between governments outside a basic policy framework and a predilection for conducting inter-governmental affairs in a quasi-diplomatic fashion. Prime Minister Lesage has been Minister of Federal-Provincial Relations since the creation of the Department and the Deputy and his small group of highly-trained officials play a more influential role both in the determination of provincial policies and in inter-governmental relations than do similar agencies in the other provinces. In Quebec for both ideological and other reasons federal-provincial relations are a preoccupation and it has been easier than elsewhere to subsume more particularistic goals to the general provincial strategy of enhancing its own influence and increasing its financial resources. Functional relationships between specialized Quebec agencies and their federal counterparts have in some matters been less close than was







the case in the other provinces and some further attenuation of these relations may come with the implementation of the contracting-out arrangements. It is very significant also in the influence of this Department that less in Quebec than in the federal government or those of the other provinces is there a tradition of regarding federal-provincial relations mainly as a concern of the treasury or finance departments.

The Lesage government has pursued its objectives in federal-provincial relations with sophistication and with a considerable degree of success. The strategy of the Duplessis administration was to oppose on dogmatic ideological and constitutional grounds what it regarded as federal challenges to provincial autonomy. Apart from the outcome of the dispute about tax abatements which began in 1954, this strategy was almost a total failure in obstructing federal involvement in matters within the legislative jurisdiction of the provinces. The incumbent government opposes such involvement with explicitly formulated policies of its own. There is general agreement that in the discussions about contributory retirement pensions between the federal and provincial governments which began in 1963 the Quebec plan was in a purely technical sense superior to the federal one. Quebec officials have negotiated with the federal government on the latter's plan for tax incentives







in depressed areas on the basis of their evolving objectives for regional development. In the field of vocational training the Quebec government's definition of its policies have also been framed in detailed and explicit terms. The Quebec demand to contract-out of the federal youth allowance and university loan plans came in circumstances where the province had developed its own <sup>pro/</sup>grammes in these fields. Recent developments in Quebec as these relate to cultural affairs, mineral development and social assistance indicate new matters in which federal initiatives will be met by explicit provincial policies. The Deputy-Minister of Federal-Provincial Affairs, Mr. Claude Morin, has pungently contracted the old and the new strategies:

"..Anciennement, les Québécois allaient à Ottawa aven en main tel article de la Constitution et ils disent: cet article vous interdét de faire ce que vous proposez de mettre en oeuvre. A quoi Ottawa retorquait: vous avez raisen, mais accepteriez - vous que pour le moment nous procédions autrement. Et Québec acceptait..... Maintenant c'est fini. La devise du Québec, c'est on a fini de taponner! Invoquer la Constitution me semble ridicule. C'est comme invoquer saint Thomas." 35

In regard to the question as to whether Quebec is a province "comme les autres" the policy of the Lesage government has been somewhat ambiguous. The rhetoric of Franch-Canada nationalism has as in the past asserted the unique place of the province in the Canadian federation. However, the Lesage administration like its predecessors has continued to argue that Quebec was demanding only what belonged to all the provinces equally as of right and the statements of







the Prime Minister at the Federal-Provincial Conference of July 1960 seem to indicate that the newly-elected Quebec administration hoped to lead a general provincial movement against federal influence. Also, in his defence of the so-called Fulton-Favreau formula the provincial leader took the traditional Quebec position that in so far as projected amendments to the constitution were concerned the rule of provincial unanimity must prevail. In an illuminating debate concerning youth allowances and loans to university students which took place in the Quebec Legislative Assembly on July 20, 1964 a different strain in government policy emerged. The position of the Leader of the Opposition, Mr. Daniel Johnson, was essentially that federal involvements in these matters were essentially encroachments on provincial jurisdiction and should have been opposed as such by the Quebec government. Mr. Lesage's reply to this criticism was this:

" Et maintenant, c'est que en même temps que nous avons dit à Ottawa; Ne venez pas toucher à l'éducation dans le Québec il y a d'autres provinces qui elles sont intéressées. Qu'est-ce que vous voulez que j'y fasse? Je ne peux toujours pas les battre. Je ne peux toujours pas envoyer la sûreté provinciale envahir les autres provinces pour leur dire quoi faire. Si je réclame au nous du Québec, le respect de l'autonomie du Québec, je n'ai pas le droit d'aller dire aux autres provinces quoi faire." 36

In his Convocation Address to Carleton University on May 21, 1965 the Quebec Minister of Education, the Honourable Paul Gerin Lajoie, indicated a point of view on Quebec's place on Confederation very different







from the traditional one:

" Up to the present, Quebec has asked nothing for itself which it would be unwilling to recognize for other provinces. But one may wonder if this is the appropriate attitude to take?

Quebec can speak only for Quebecers, as the other provinces can only speak for their inhabitants. Quebec can be only an ally to their claims, but it cannot be their spokesman. The resistance that Quebec has met, and that it continues to meet, in its struggle to obtain a larger measure of autonomy may be due to the fact that it has tended to assume that 'what is good for Quebec is good for the other provinces'. But since what is good for the rest of the country is not always good for Quebec, the converse of the proposition must, doubtless, also be admitted.

.....  
 From now on, the question which must be faced is this: do the other nine Canadian provinces consider themselves to be 'nations' or 'societies' sufficiently distinct from one another to want the same measure or the same form of autonomy as does Quebec?

If they desire a unity of action among themselves in the areas where Quebec deems it to be essential to be able to act freely and autonomously, what is there to hinder us from translating this desire into a constitutional form? What objection or what difficulty would there be if Canada were to adopt a constitutional regime which would take account the existence of two 'nations' or 'societies' with the one Canada?" 37

It is as yet too early to determine whether the analysis that Mr. Gerin-Lajoie presented in a rather hypothetical fashion represents a major turning point in the policies of Quebec as it relates to this crucial aspect of Canadian federalism.

The impact of the new Quebec on the relations between the other provinces and the federal government is difficult to evaluate. As we saw in Chapter Three, the coming to power of the Lesage administration







coincided in time with a group of other circumstances working toward attenuating the dominance of the federal government which had been established during the Second World War and the subsequent decade and thus the influences from Quebec have been in the same general direction as those which were strong elsewhere. However, the Quebec Government has never been able to establish itself as the leader of a provincial "united front" against Ottawa and on only a very few important issues, including the original federal plan for a municipal loan fund and the federal decision to refer the question of off-shore mineral rights to the Supreme Court, has there been a heavy predominance of provincial opposition to the federal authorities. On the other hand, in only a few circumstances has the Quebec Government been isolated from those of the other provinces. As we have seen, the general provincial disposition has been to view the contracting-out device with some apprehension as an expedient to meet Quebec's special requirements. Also the Quebec administration has failed to gain support from the other provinces for either a federal-provincial secretariat or a permanent council of the provinces and at the July 1965 Conference the Ontario Government explicitly expressed its opposition to the establishment of the former kind of organization.<sup>38</sup> Thus the developments of the past five years have not resulted in either of the circumstances which would have exposed the Canadian federal system to almost intolerable







strains -- the isolation of Quebec or, alternatively, unified provincial opposition to the federal authorities.

There are apprehensions in some of the provincial administrations of what is perceived to be an increasingly bilateral pattern of relations between the Quebec and federal governments within which important federal-provincial matters are settled between the leaders of these two governments. At two critical junctures in Quebec-federal relations -- in the aftermath of the Federal-Provincial Conference in the spring of 1964 and in the dispute about powers to conclude international agreements a year later -- important "summit" meetings involving the two Prime Ministers and their representatives were held. It was presumably in reaction to this kind of interaction that the Government of Ontario in its Brief to the Federal-Provincial Conference of July 1965 stated:

" ....we believe that matters of federal-provincial interest and concern should be discussed among all eleven governments. We are not suggesting that bilateral arrangements should never be concluded between the federal government and a particular province any more than we deny the special features that apply to the case of Quebec. However, we do believe that many issues that affect Quebec are not peculiar to Quebec but affect all provinces. It is important not only for the workings of federalism in Canada, but also for the preservation of national unity that the interests and wishes of all provinces be considered and that full discussion should precede such decisions. If we are all for federalism, federalism must be for all." 39

In the present situation in federal-provincial relations







it is impossible to judge how far any or all of the other provinces will accede to a special status for Quebec but there are undeniably some limits on their willingness to do so.







NOTES

J. A. Corry "Constitutional Trends and Federalism" in Evolving Canadian Federalism, A. R. M. Lower, F. R. Scott, et al, Duke University Press, Durham, N.C., 1958, pp. 92-125.

The Honourable J. L. Pépin has given the most systematic analysis from this point of view. See his speech "Le fédéralisme coopératif" in Le Canada Face à L'Avenir, Conference annuelle de l'Institut Canadien des Affaires Publiques (1964), Les Editions du Jour, Montreal, 1964, pp. 113-124.

Various speeches made during the past two years by Mr. Lamontagne and the Honourable Guy Favreau have emphasized this theme. Two former Progressive-Conservative Ministers have claimed credit for their party in initiating these procedures with special reference to the Council of Resource Ministers. See the speech by the Honourable Walter Dinsdale, House of Commons Debates, May 14, 1964, pp. 2878-2881 and the speech by the Honourable Alvin Hamilton at Provencher, Manitoba, Oct. 21, 1963 (mimeo).

Speech "Rebirth through Reason: Co-operative Federalism", given on Feb. 7, 1965 to the Chamber of Commerce, Matane, Quebec. Mimeographed (Translation) p. 8.

The vigorous reaction of several of the provinces to the federal decision announced on Dec. 31, 1964 to refer the question of jurisdiction over off-shore mineral development to the Supreme Court shows in this instance at least a profound disagreement about the kinds of matter appropriate for judicial determination.

Proceedings, p. 39.

Prime Minister Lesage asserted at the Federal-Provincial Conference of July 1965 "Sound practices of federalism requires that each government respect the jurisdiction of the other legislative authorities.....Thus, even when legislating in fields within its own jurisdiction, each government should be concerned with the repercussions of its decisions on the others' plans and on the orderly conduct of the country's affairs in general. In our opinion, a government may not do exactly as it pleases simply because it has legal authority in a given field. Instead in the interest of administrative efficiency and the search for genuine solutions, it must see that its interests are compatible with those of the other legislative authorities.....In short, the legality of an act should not be the only criterion; it is also important to weigh its timeliness and repercussions." Statement (mimeo), p. 26.

Statement, mimeo. p. 3.

Daniel J. Elazar, The American Partnership: Intergovernmental Co-operation in the Nineteenth Century United States, Chicago, University of Chicago Press, 1962.

The Dominion Council of Health has been meeting regularly since it was established in 1919 and the Canadian Association of Administrators of Labour Legislation since 1938.







1. King's Printer, Ottawa, 1939, particularly pp. 7-14.
2. King's Printer, Ottawa, 1939.
3. p. 8.
4. In Sociology Today, Ed. by Robert K. Merton, Leonard Brown and Leonard S. Cottrell, New York, 1959, p. 102. For further analysis of administrative relations in Canadian federalism see Donald V. Smiley, Conditional Grants and Canadian Federalism, Canadian Tax Paper No. 32, Canadian Tax Foundation, Toronto, 1963, Chapter III.
5. Debates, pp. 1-3.
6. In August 1965 Mr. Merin was appointed Chairman of a newly-appointed interdepartmental committee on relations between Quebec and foreign nations. The committee is composed of the Deputy Ministers of the departments so involved. At about the same time Professor Jacques Parizeau formerly of L'Ecole des Hautes Etudes Commerciales became the government's chief economic adviser on a full-time basis. For a commentary on these developments see Claude Ryan's Bloc Notes, Le Devoir, 27 Août, 1965. Mr. Lesage is at the same time Prime Minister, Minister of Finance and Minister of Federal-Provincial Affairs.
7. Mr. Macdonald is also Chairman of the Ontario Committee on Confederation, a representative group of private citizens appointed by Order-in-Council to advise the Prime Minister on federal affairs and to conduct investigations into those matters.
8. Answer to Question No. 2160 by Mr. Heath Macquarrie, M.P., Votes and Proceedings of the House of Commons, Oct. 20, 1964.
9. Materials supplied by Privy Council office.
10. A. R. Kear "Co-operative Federalism: A Study of the Federal-Provincial Continuing Committee on Fiscal and Economic Matters", 6 Canadian Public Administration (1963), pp. 43-56.

Statement made by the Honourable Walter L. Gordon, Minister of Finance, October 15, 1964.

- This is a relatively new sphere of potential federal-provincial conflict and may become more contentious as the plans for inter-provincial regional development of Quebec, Ontario and perhaps later other provinces become more explicitly formulated. See the policy statements on this matter made by the Prime Ministers of Ontario and Quebec at the Federal-Provincial Conference on July 19, 1965.
- 11. "Federal-Provincial Fiscal Developments", Report of the 1964 Conference, Canadian Tax Foundation, Toronto, 1965, pp. 224-225. Premier Roblin of Manitoba has claimed for some time that the priority question must be faced directly in the federal-provincial context and the whole of his opening speech to the July 1965 Conference was in these terms.







See, however, "Interprovincial Co-operation", Richard Leach, 2 Canadian Public Administration (1969) pp. 83- and J. H. Aitchison "Interprovincial Co-operation" in The Political Process in Canada, Essays in Honour of R. Macgregor Dawson, J. H. Aitchison, Ed., Toronto, 1963, pp. 153-170.

Proceedings, p.126.

Premier Smallwood of Newfoundland gave as his reason for not attending the 1965 Conference in Winnipeg that the meetings should be held among the government leaders without their advisors.

For a general analysis of the compounding of the cultural and the regional-economic conflict because of the new directions in Quebec see Donald V. Smiley "The Two Themes of Canadian Federalism", XXI Canadian Journal of Economics and Political Science, (Feb. 1965) pp. 80-95.

Proceedings, Ottawa, 1964, p. 40.

The range of matters about which the Quebec Government feels a direct concern has expanded and will undoubtedly continue to do so as new provincial policies develop. At the Federal-Provincial Conference of July 1965 Prime Minister Lesage spoke of new needs for federal consultations in respect to federal policies relating to regional economic development, the training and mobility of manpower and public assistance. Obviously too, new issues will arise as the Quebec government formulates various kinds of objectives in the international sphere.

p. 45.

Interview given to Gerard Pelletier by Mr. Gerin-Lajoie and reported in Le Devoir, 1 Mai 1965. The Minister explained his views more fully in his address to the Montreal Consular Corps on April 12, 1965, Department of Education, Information Service (mimeo).

ibid.

"Federal-Provincial Fiscal Relations", ibid, p. 230.

Statistical Yearbook, Quebec, 1961, p. 62.

Quoted in Louis Martin, Les Technocrates, Le Magazine Maclean, Oct. 1964, p. 26.

Debates de l'Assemblée Legislative, p. 4850.

Department of Education, Information Service (mimeo) pp.6-7. Emphasis on text. Mr. Gerin-Lajoie's argument was repeated in his address to the Couchiching Conference in Aug. 1965.

Prime Minister Robarts said "we have recently arranged for the Chief Economist of the Province to undertake the co-ordination







of research and policy in federal-provincial affairs and to form the nucleus of a secretariat for that purpose. We believe that good governmental practice demands the continuance of close contact between individual departments of government. We prefer to see federal-provincial relations conducted in that manner, with our own secretariat under the Chief Economist carrying out the provincial co-ordination." Mimeographed statement, p. 38.

9. ibid. p. 39.







CHAPTER 8.CO-OPERATIVE FEDERALISM: AN EVALUATION.

The institutions and procedures of co-operative federalism are evolving rapidly. It is this impossible except in the most general and tentative way to evaluate (a) the circumstances in which the new ways of behaving by the federal and provincial governments will result in a relatively stable equilibrium in their mutual relations being reached through the ongoing process of executive interactions, (b) the likelihood of these circumstances occurring. The general situation with which co-operative federalism attempts to deal can be simply described. The federal and provincial governments are now locked into a system of mutual interdependence in such a way that each level in pursuing its objectives will be frustrated to an intolerable degree unless some degree of intergovernmental collaboration is effected. If co-operative federalism is to succeed there must be established a measure of consensus both among the politicians and the civil servants who work these institutions and among members of the politically influential publics that this alternative is more appropriate than any other for meeting the challenges that governments in Canada face. It is easy to suggest several kinds of circumstances / <sup>whose</sup> occurrence either alone or in conjunction would cause co-operative federalism to fail. For a wide variety of reasons, some or most of the politicians and civil servants involved in the day-to-day workings of federal institutions might opt for some other solution.







Co-operative federalism might be perceived by the dominant political groups in Quebec not to meet the legitimate aspirations of French-Canada. Or there might grow up in part or all of the country the belief that the processes of joint decision-making imposed an unduly high price in terms of economic stability and growth or in respect to other matters where decisive public action was considered essential. However, co-operative federalism is a response to federal-provincial interdependence and unless politicians and civil servants act quite irrationally the procedures of collaboration can be expected to evolve unless and until the present degree of interdependence is significantly attenuated. This attenuation would of course occur if the federal system were to be shattered into two or more of its component parts either through Quebec achieving independence of the rest of Canada or the implementation of one or the other of the "associated states" alternatives. However, less extreme solutions could in a lesser degree work in the same directions. The framers of a new federal constitution might assign a high priority in their plans to assigning exclusive powers over particular functions to either the central or the regional governments and exclusive access to particular tax sources so that these responsibilities might be discharged without the financial dependence of one level on the other. Even the ongoing interactions between the federal and provincial governments within the existing constitutional framework may result in one or the other achieving unchallenged







dominance in respect to particular public functions where now both have influence.

It would appear to us that co-operative federalism can survive in Canada only if it goes some distance in meeting these three conditions:

First, the procedures of joint federal-provincial decision-making result in effective responses to the demands made on government for public action.

Second, there are developed patterns of political behaviour which sustain, or at least do not unduly frustrate, the influences toward collaboration impinging on the federal and provincial executives.

Third, the results of federal-provincial collaboration satisfy in some degree the conflicting viewpoints of the French-speaking majority in Quebec and of other Canadians about the appropriate role of the federal government.

The first part of this Chapter is a tentative evaluation of the possibilities of the evolving procedures of co-operative federalism in meeting these three demands on the Canadian federal system. Proceeding from this analysis an attempt will then be made to assess the relative appropriateness of co-operative federalism and the proposals for radical and explicit constitutional changes in our federal institutions as alternative ways in which the present challenges can be met.

#### CO-OPERATIVE FEDERALISM AND PUBLIC POLICY EFFECTIVENESS.

There can be little disagreement with the general proposition that if liberal-democratic institutions are to survive they must somehow find ways of dealing with the







very great number of varied and often contradictory demands made upon them and that only by demonstrating such effectiveness can enough support be generated among the politically influential elements of democratic communities to ensure the long-run continuance of these institutions. In federal systems the individual jurisdictions must not only learn to respond effectively to the demands upon them but also evolve adequate means of central-regional articulation to cope with the circumstances of the interdependence of the two levels. Such articulation can take two forms:

- co-ordination, the process by which a complex of public activities is ordered according to some set of goals or priorities. Co-ordination relates both to the ranking itself and the subsequent actions to implement these decisions.

- consultation, the process by which officials and public agencies with some significant degree of both independent discretion and mutual interdependence communicate to each other their respective perceptions of situations and their judgments of the appropriate way of dealing with these situations. Co-ordination will be facilitated by effective procedures of consultation but does not always result from it.

Co-ordination and consultation in respect to public policy are of course easier to achieve when only one jurisdiction is involved and when, in principle at least, activities can be ordered through one hierarchical







structure of authority than when, as in a federal system, the participants have legal and constitutional safeguards for their independent positions. Within a hierarchical system authorized channels of communication are usually provided, although other patterns grow up through deliberate design or otherwise. Hierarchy also provides formal procedures by which solutions may be imposed in the absence of agreement and as J. A. Corry pointed out many years ago the very existence of these procedures may inhibit<sup>1</sup> "bickering". The relations between the federal and provincial governments cannot of course proceed within a pattern of hierarchical authority. On the surface, it would seem that the processes of joint decision-making which characterize co-operative federalism lead almost inevitably to delays and frustrations in the framing and implementation of public policy.

Despite the inherent difficulties in working the institutions of co-operative federalism, it is significant that in the past two years a very significant volume of public policy has resulted from these collaborative procedures. Agreements of fundamental importance have been reached in respect to contracting-out, public contributory pensions plans and important aspects of economic direction and control. Important changes appear to be coming in the fields of medical insurance and public assistance. The agreement to set up the Tax Structure Committee was a major achievement in this direction and one can be reasonably optimistic that the Committee will have some measure of success in attaining the ambitious objectives set out in







its terms of reference. We are not here arguing that these actual and anticipated policies resulting from the processes of co-operative federalism were the appropriate responses of the governments concerned to the demands upon them. Rather, we would argue that the record indicates that these procedures of joint decision-making have not in the recent past imposed insuperable barriers to the formulation and implementation of public policies of fundamental importance.

Consultative procedures leading to federal-provincial policy co-ordination are extraordinarily subtle and one cannot predict with any assurance the form which the most effective of these procedures will take. What seems reasonably certain, however, is that the establishment of administrative machinery, even though ingenious, will not of itself bring constructive relations about. The following general points can be made:

1. Consultation leading to effective co-ordination will be facilitated when the participants can speak authoritatively for their respective governments. This does not mean that in respect to every matter under discussion these officials involved have received explicit "instructions" from their governments -- such a formal requirement would inhibit effective consultation. What is necessary is that the participants perceive each other as persons closely in touch with the perspectives of their respective administrations and with some degree of influence in determining these perspectives. There is also the requirement that is







probably not completely fulfilled in any of the governments that there are effective procedures of Cabinet and Treasury control so that programme agencies and programme goals are subordinated to more comprehensive goals. As we saw in Chapter Seven, there has developed a complex pattern of functional relations between counterpart agencies of the two levels and in some circumstances those involved in these relations may resist attempts to subsume their activities under less particularistic goals. Although the effective articulation of federal and provincial objectives involves these functional interactions being sustained, and in some cases strengthened, effective relations concerning more comprehensive kinds of public policies require further measures of overhead control than have in some jurisdictions been developed.

2. Consultation and co-ordination will be facilitated when the participants come to share as much of a common frame of reference as is compatible with their continuing loyalty to their respective governments. Federal-provincial collaboration in respect to a very large number of specific programmes and projects has been possible largely because those involved were members of the same professions or sub-professions and, as we have seen, such membership characteristically means not only the common possession of specialized knowledge and techniques but also the commitment to certain public-policy preferences. When matters of more fundamental political and economic choice are at issue it is unreasonable to expect that federal-provincial agreement can







be reached in terms of such professional criteria, although consensus on matters of economic policy is more likely than otherwise if the elected and appointed officials involved are relatively sophisticated in the ways of contemporary economic analysis. However, a prolonged period of constructive relationships between the elected and appointed officials of the federal and provincial officials can be expected to result in a kind of community being developed, a community with its own characteristic perspectives and procedures and with its own subtle ways of distributing status and influence among its members. This development will of course be encouraged if the membership in such a group becomes relatively stable and if there is some movement of personnel among the governments involved. It is obvious of course that the growth of community is dependent upon the politicians of the federal and provincial governments continuing to support such kinds of collaborative behavior.

3. Consultation and minimum levels of co-ordination will be facilitated if the participants are more committed to the substantive results of particular policies than to enhancing the influence of their respective governments. Co-operative federalism requires a high degree of pragmatism, even opportunism, among those officials involved in federal-provincial relations as to what functions each level may respectively perform and their relative degrees of influence in respect to these matters. Thus any assumption by federal officials that decisions by the central government are somehow inherently "better" or more legitimate than those of







the provinces are clearly incompatible with effective federal-provincial collaboration. Conversely, if some or all of the provinces carry out a persistent policy of attempting to extend their range of discretion at the expense of the federal authorities regardless of the consequences of such actions for particular public responsibilities the prerequisites of co-operative federalism are challenged in the most fundamental way. Any effective system of federal-provincial relations must of course deal with circumstances in which the interests of the governments involved conflict and it is only realistic to recognize that these differences characteristically arise from the divergent responsibilities these jurisdictions have assumed rather than from the perversity of the authorities of one level or the other. However, no government can be a constructive collaborator in the enterprise if its overriding objective is to decrease its dependence on the others regardless of the consequences of such actions for the substantive results of public policy.

4. Effective consultation leading to at least limited measures of co-ordination will be facilitated if the participating governments are predisposed to include the objectives of the others within their own priorities. Let us take a simple example. Assume federal-provincial discussions about a proposed measure where result would be to increase municipal borrowing for capital purposes. Assume further that the primary objectives of the federal authorities relates to the income and employment aspect of these expenditures and that the first aim of the provinces is to safeguard the financial solvency of the municipalities.







If each government presses its primary aim to the exclusion of the concerns of the other it is likely that these will prove incompatible, to a greater or lesser degree. But let us make more optimistic assumptions that either before or as a result of intergovernmental consultations (a) the provinces recognize both that the increase in gross demand expected to result from the measure is desirable and that the federal authorities have a legitimate interest in ensuring full employment, (b) the federal government shows a genuine interest in the continuing financial stability of the municipalities and a sympathetic appreciation of provincial concern for this objective. Under such circumstances effective consultation can lead to a solution which includes both federal and provincial aims, a solution agreed upon against a background of mutual respect among the governments concerned for the constitutional responsibilities of the other.

5. Consultation will be facilitated when for the most part they take place within a framework of confidentiality and when both formally and informally the governments come to share with each other information about situations and their appreciation of these situations which is not available to the public. It does not seem necessary to argue that the processes of federal-provincial collaboration and consultation about fundamentals cannot be successful unless to some considerable degree they can take place without publicity until agreements are reached. The sharing of information and views among the officials must be







continuous and it is impossible to defend the situation which existed in the past where the federal authorities were prepared to share these more freely with friendly foreign governments than with provincial administrations. In the present context of federal-provincial relations, however, the federal government appears more sensitive to provincial responsibilities than are at least some of the provinces in respect to matters within their own sphere of constitutional jurisdiction which may have significant implications for federal policies.

In general, the relative success of co-operative federalism in recent years in harmonizing to some tolerable degree the objectives of the federal and provincial governments has depended much more on the attitudes of the officials involved and on the restraints they have placed on their own behavior than on the development of more institutionalized procedures of inter-governmental collaboration. The existing structures are extraordinarily complex and work as well as they do largely because the individuals involved, including both elected and appointed officials, have come to know and respect each other in their increasingly frequent contacts. Whether or not this somewhat personalized fabric of co-operation could survive the dislocation of a rapid displacement of the present personnel is a matter of conjecture.

#### THE POLITICS OF CO-OPERATIVE FEDERALISM.

The preceding Chapters of this study have analyzed co-operative federalism exclusively as it relates to interactions between the federal and provincial executives.







It would, however, be unrealistic in evaluating the possibilities of this variant of federalism being sustained to ignore completely the political context within which these relations take place, to ignore the circumstance that those whose decisions are over-riding in federal-provincial relations are successful politicians who must periodically fight campaigns for re-election and who must continually in their respective legislatures and outside defend their public conduct. There are two difficulties of a broadly political nature in the contemporary variant of co-operative federalism:

First, federal-provincial relations have come increasingly to deal with policy matters of the most fundamental kind -- matters which a democratic community has a disposition to settle by the processes of free and open debate and political competition -- and yet the success of the governments concerned in arriving at tolerable settlements in such situations necessitates a considerable degree of insulation from publicity and from certain varieties of partisan-political pressures.

Second, although the interdependence of federal and provincial officials in their policy-making and policy-executing roles exercises strong influences toward collaborative behavior there are fewer influences toward co-operative impinging on elected officials in their partisan-political capacities.

The situation involving the so-called Fulton-Favreau formula illustrates one of the kinds of political diffi-







culties which co-operative federalism may face. From the time that discussions between the federal and provincial governments in respect to an amending procedure were reactivated by the then Minister of Justice, the Honourable E. Davie Fulton, until the publication of the draft formula upon which all the governments had agreed in the summer of 1964 there was little public debate on the issue even among specialists in constitutional matters and it was impossible for those outside government to know except in a general way what was going on.<sup>2</sup> Between the time the draft formula was agreed upon and the spring of 1965 the projected amendment was approved by the legislatures of all the provinces except Quebec without causing the incumbent provincial administrations significant political difficulties. However, by this time considerable opposition to the Fulton-Favreau formula had been aroused -- opposition from members of the Progressive-Conservative and New Democratic parties in the House of Commons, from the Union Nationale and several influential private groups in Quebec and from both French and English-speaking specialists in constitutional matters. The federal and Quebec governments thus faced a difficult situation. They had been precluded because of the relative confidentiality of the discussions preceding the agreement from cultivating public support for the new procedure. The matter at hand was a complex one and the draft formula was the result of a complicated compromise among the governments involved and yet many of the critics of the draft formula put their arguments in terms of broad and easily understandable







considerations quite unrelated to the acceptability of their proposals to the eleven governments. Despite these difficulties, the failure of either or both of these administrations to press the issue to legislative approval would place on them the onus for delaying the enactment of a Canadian amending procedure which had been under discussion for nearly forty years and might possibly complicate their relations with the administrations who had secured the assent of their legislatures. It is likely that similar situations will arise in the future: fundamental policy discussions carried on in confidence between the federal and provincial governments and culminating in an agreement which is the subject of vigorous debate largely precluded up until that time. Neither the members of the opposition parties nor the other members of politically influential publics have apparently fully accepted the legitimacy of high policy being made by federal-provincial agreement and because of this the policies devised by these procedures may be subjected to more severe criticism -- and criticism somewhat harder for their supporters to answer -- than if they were made by a single jurisdiction.

The relationships between federal and provincial political parties and the impact of these relations on the stands on public issues that these parties take are extraordinarily complex and have never been systematically examined.<sup>3</sup> In some cases the electoral success of a federal or provincial party is significantly aided or frustrated by actions of the party of the same name at the







other level and yet in other circumstances there may be little interdependence. Partisan-political interactions between Members of Parliament and members of the same parties in the provincial legislatures are conditioned by this kind of factor, by financial and other relationships between federal and provincial party organizations, by antagonisms and friendships growing out of previous political experiences and other influences. In most cases, however, it would appear that successful federal and provincial parties have resources of funds, organization and popular support independent of party fortunes at the other level and it seems usually to happen that only very weak parties are effectively subordinated to their electorally more successful federal or provincial counterparts. In circumstances where the federal government and that of a province bear the same party label there is thus no assurance that their relations will be harmonious and Canadian political history has many contrary examples. On the other hand, where federal and provincial parties in power are of different complexions there are no overriding partisan-political inhibitions imposed on collaboration in policy matters where mutual interests make this appropriate. In general, however, the influences on the federal and provincial administrations to collaborate because of their mutual interdependence in policy matters have little counterpart in the partisan-political system.

CO-OPERATIVE FEDERALISM AND THE ROLE OF THE FEDERAL GOVERNMENT.

It has been stated that "the basic problem of our contemporary federal system is that English-Canada is







determined to effect its purposes through the federal government in such a way as to challenge what most French-Canadians believe to be the necessary conditions of the expansion and survival of their culture".<sup>4</sup> The problem is, however, much more complex than those who posit the federal authorities as the exclusive representative of the most significant English-Canadian interests and Quebec as the sole public vehicle of French-Canadian objectives believe it to be. Apart from cultural dualism, Canada is a federal country because of the same kinds of regional loyalties and interests which sustain federal institutions in unicultural nations like Australia and the United States. The struggle for provincial autonomy has never been waged by Quebec alone and in some periods and in relation to some issues the battle has been waged more aggressively by other provinces. On the other hand, the federal authorities have, particularly since 1945, involved themselves in many matters with a direct "cultural incidence", and in respect to such involvements in health, welfare and education the attitudes and policies of Quebec have differed significantly from those of the other provincial governments. In this decade the increasing disposition of the Quebec majority to define its cultural requirements in terms of provincial autonomy in economic matters has created a new dimension in the divergent ways in which English and French-speaking societies define the appropriate role of the federal government. Quebec influences toward provincial autonomy have an ideological force absent from pressures exercised







in the same direction by the other provinces. Because of these factors, the institutions and procedures of co-operative federalism must if they are to succeed embody some recognition of the special place of Quebec in the Canadian federal system.

The broadly political nature of the processes of co-operative federalism give a province which believes that its requirements for autonomy are more extensive and urgent than do other jurisdictions very real advantages in pursuing this objective. Sections 91, 92, 93 and 95 of the British North America Act provide a diversion of legislative powers which is uniform for all the provinces. Proceeding from this constitutional basis, however, the political processes permit very significant degrees of provincial differentiation. Quebec has very important advantages in these processes inherent both in its size and in the recognition by the federal government, and to some degree those of the other provinces, that relations between Quebec and the federal authorities are crucial to the continuing existence of the Canadian federal system. In this decade the Quebec government has very effectively capitalized on these advantages by making more explicit than before its special requirements and by prosecuting these objectives in a very sophisticated way. It is thus quite inaccurate to say as did the Quebec Leader of the Opposition that in the forum of the federal-provincial conferences which, according to him, have become "l'autorité suprême du pays",<sup>5</sup> "le Québec n'a pas plus de droits que Terre-Neuve".







The contracting-out procedure which was analyzed in Chapter Six is of course the major institutional recognition of the special place of Quebec in the Canadian federal system. At the highest policy levels there are elements of a bilateral relation between the Quebec and federal governments which have no counterpart in the case of the other provinces. So long as the federal authorities and those of the other provinces perceive that relations with Quebec are crucial to the continuing existence of the federal system the claims of that province will be more influential than those of other provinces, however forcefully these latter are made.

The ongoing processes of co-operative federalism contain, however, several important constraints on the recognition of a special position for Quebec within the federal structure. As we have seen, the federal government has never seen fit to provide options which were not in law equally available to all provinces. Undoubtedly the other provincial administrations will resist attempts at "bilateralizing" the relations between the Quebec and federal authorities. At any time the polarization of political relations between English and French-Canada could destroy the special status that Quebec has been able to attain within the federal system.

It is thus impossible to evaluate except in the most general and tentative way the possibilities of co-operative federalism in reconciling the divergent views of the Quebec majority and other Canadians about the appropriate role of







the federal government. It is significant that the demands from the new Quebec arose precisely at the time that the centralized variant of Canadian federalism which was established during and after the Second World War was being subjected to other challenges and influences toward provincial autonomy from other directions. It is possible that in the future Quebec will press her claims in a context where the demands are running toward centralization elsewhere in Canada and the situation will become more difficult and perhaps less amenable to adaptation without explicit constitutional changes. Whether or not co-operative federalism will in the future be able to effect a reconciliation between the divergent viewpoints of French and English-Canadians as to the role of the federal government is impossible to predict.

#### CO-OPERATIVE FEDERALISM AND CONSTITUTIONAL CHANGE.

Those who wish changes in the Canadian federal system can be divided into two groups -- those who press for such reforms to come through the ongoing processes of federal-provincial collaboration and those bent on explicit alterations in the text of the existing constitution. The debate between those belonging to these groups is not easily joined. Persons who are convinced that a substantial rewriting of the constitution is necessary often appear to place a high value on clarity and explicitness in our governmental arrangements and on the symbolic significance of a constitution as embodying the fundamental moral and political principles on which the regime is founded. By







these tests, co-operative federalism is of course deficient. On the other hand, supporters of a new constitution have not, so far as we are able to discover, made a careful study of the traditions and institutions of Canadian federalism as they have evolved in the past five years or of the possibilities that some or most of the objectives they seek could be attained through the ongoing processes of federal-provincial interaction. But proponents of co-operative federalism have not investigated in any detail the incidence of formal constitutional arrangements on these institutions or the constraints that these arrangements impose on the attainment of particular substantive objectives.

Our evaluation of the relative appropriateness of the two broad alternatives as procedures of constitutional evolution will proceed in terms of answers to three questions:

- if we assume that changes will require the agreement of the federal government and those of most if not all of the provinces, is it more likely that such agreement will be secured for explicit constitutional change than for adaptation through federal collaboration on particular public policy matters?
- can the relations between the federal and provincial governments be more appropriately regulated through interactions between the federal and provincial executives than through other procedures?
- is it appropriate to amend the constitution to provide explicitly for the institutions and procedures of federal-provincial relations?







# 1. THE NECESSITY FOR FEDERAL PROVINCIAL AGREEMENT.

So far as we are able to discover, those who wish the Canadian constitution to be rewritten have never seriously considered whether or not it is likely that politically influential elements in the country could be brought to agreement on this matter. This applies to supporters in Quebec of the associated states solution, to Peter J. T. O'Hearn<sup>6</sup> and to Marcel Farebeault and Robert M. Fowler<sup>7</sup> who have presented detailed draft constitutions and to those persons who have called for a new constitution without suggesting what they believe its nature should be. It appears unlikely that the required measure of agreement could be secured in the near future. The political relations between the "two founding races" are in a critical and fluid state. The institutions and procedures of federal-provincial relations are evolving rapidly. We would therefore agree with one scholar who remarked "to try to redraft the Canadian constitution now would be the same as trying to write a peace treaty while a war was still on". It is possible, however, to foresee limited changes in the constitution. One could imagine agreement to rewrite the document limited to dropping its obsolete sections and improving its literary qualities. Perhaps progress could be made toward a constitutional bill of rights binding on all governments and not subject to unilateral amendment by any. It may be possible to find consensus on more adequate protection for French and English-speaking cultural minorities. On the other hand, any attempt to rewrite the constitution so as to change in a fundamental way the







division of legislative powers between Parliament and the provinces would require simultaneous federal-provincial agreement on a very wide range of basic political issues. It seems to us unlikely that such a consensus will emerge in the immediate future.

The ongoing processes of co-operative federalism allow politicians and civil servants to search for agreement where it can be found. We have argued in the last Chapter that the current circumstances of federal-provincial interdependence makes necessary effective measures of intergovernmental collaboration in respect to fairly fundamental policy alternatives. On the other hand, a federal-provincial conference, unlike a constitutional convention, deals with specific proposals for action and does not have to strive for agreement on matters of abstract definition or on how to deal with hypothetical situations which may arise in the future. In the crucial area of the direction and control of the Canadian economy Jacques Parizeau has advanced a persuasive argument which is applicable to an even broader range of problems facing the Canadian federal system:

"(can we) conclude....that changes in the Constitution are likely to help the organization of adequate and co-ordinated economic policies? Personally, I doubt this very much. On the contrary, the Constitution as it stands now has helped to narrow the areas of conflict. To attempt, in present circumstances, a full revision or redrafting of the Constitution means really that the whole front will be ablaze; any rational solution to urgent problems of economic policies might have to be postponed for a long time. It would seem much more fruitful to find first an empirical equilibrium between the parties and then draft it into a legal text." 8

## 2. "EXECUTIVE" FEDERALISM AND OTHER ALTERNATIVES FOR REGULATING FEDERAL-PROVINCIAL RELATIONS.







There are two alternatives to co-operative federalism in regulating the relations between the federal and provincial governments. The first is that the judiciary should assume a more active role in delineating the respective powers, privileges and responsibilities of the two levels. This appears in the light of recent experience in Canada and other developed federations to be unrealistic. Judicial interpretation of the constitution is almost inevitably sporadic and the predeliction of the courts is to emphasize the exclusive jurisdiction of central and regional governments rather than the articulation of their activities. Furthermore, in Canada at least, many of the more important problems of federal-provincial relations, particularly as these concern fiscal matters and the direction and control of the economy, do not seem appropriate for judicial determination. The second alternative is to vest in some group or groups other than the courts with some degree of independence of both levels the tasks of making some of the most important decisions in Canadian federalism. The Rowell-Sirois Report recommended "the establishment of a permanent and independent Commission to advise the federal government on the payment of National Adjustment Grants to the provinces and to reappraise each five years the criteria according to which such subsidies were paid". This recommendation received little support at the time it was made and has since been regarded as one of the Commission's less constructive suggestions. In his recent book proposing a new Canadian constitution Peter J. T. O'Hearn suggests a "Federal Council" which, according to his draft constitution:







"shall consist of Delegates of the Governments in Canada. Each Provincial Government shall appoint one Delegate and the Government of Canada shall appoint Delegates not exceeding in number the Provincial Delegates. The Chairman shall be elected from the Delegates of the Government of Canada and the Council shall meet at the Call of the Chairman or any Five Delegates. The Council may make a binding Allocation between the Government of Canada, on the one Hand, and the Governments of the Provinces, on the other Hand, for any Period not exceeding Ten Years, of the Powers to tax and borrow, and may determine the limits of Rates or Amounts that shall apply to the Allocation; but to do so a Majority of the Delegates of the Provincial Governments representing a Majority of the Population of Canada, according to the latest general Census, must concur." 9

It is significant that O'Hearn's proposal would permit such a "binding allocation" of taxation and borrowing powers to be imposed on any or all of the provinces without their consent provided that the federal government and the requisite number of other provinces agreed. This condition alone would appear to make the proposal unrealistic. In general, the past history and present circumstances of Canadian federalism make it very unlikely that the federal government and the provinces will choose to have their relations regulated in fundamental ways either by the courts or by independent executive agencies explicitly charged with these responsibilities. Neither do we see any important advantages to their doing so.

### 3. THE CONSTITUTIONAL RECOGNITION OF CO-OPERATIVE FEDERALISM.

Is it appropriate to redraft the constitution to provide for the institutions and procedures of co-operative federalism? The draft constitution suggested by Marcel Farebault and Robert M. Fowler provides for three federal-provincial agencies -- an Economic Development Bank, a







fiscal commission and an Economic and Social Council. Under the proposed constitution each of these bodies would be composed of four members appointed by the federal government and two each appointed by Quebec, Ontario, the four western provinces and the Atlantic provinces. The Economic and Social Council would be an information-gathering agency to transmit to all jurisdictions materials on "the general trend of the Canadian economy, its medium and long-term prospects, its productivity, and the rate of growth, as well as on the comparative growth of the several Canadian provinces, the improvement of the standard of living in their several regions and the general betterment of social relations in Canada". The Economic Development Bank is to aid in the development of depressed regions, to remedy serious and unforeseen economic disturbances in particular provinces and to "aid in the execution" of important interprovincial projects. The major tasks assigned to the fiscal commission were to advise the governments concerned in their taxing and spending policies. The "statutes, regulations and by-laws" of the latter two groups are to be determined, according to the draft constitution, by "protocol between the federal government and the provinces by a three-fourth majority of the latter".

Farebault and Fowler nowhere demonstrate that the institutions and procedures they suggest would be preferable to the ones which are now in process of evolution. There is no evidence given, for example, that the proposed Social and Economic Council would proceed more effectively







than the present Economic Council of Canada in its rapidly developing pattern of relations with counterpart agencies in the provinces. Would the "fiscal commission" be more adequate in the devising of implementing of rational taxation and spending policies than the institutions which are now developing? Would the proposed federal-provincial bodies work under the direction of the increasing frequent meetings of Premiers and Prime Ministers? Such matters appear to have been ignored. Responsible proposals for reform in federal-provincial relations must of necessity be based on a careful assessment of the adequacy<sup>or</sup>/otherwise of existing patterns of interaction. There is no evidence that Farebeault and Fowler have done this. The evolving traditions of co-operative federalism -- for example, the increasingly frequent conferences of Prime Ministers and Premiers and the new tasks this institution has assumed -- are not as yet well enough established to make it prudent to embody them in fundamental constitutional law. On the other hand, we would argue that the rapidly evolving procedures have not been demonstrated to be so unsatisfactory as to make a new start in federal-provincial relations necessary. Responsible Canadian politicians and civil servants have in recent years demonstrated considerable skill in coping with the circumstances of federal-provincial interdependence. The alternative to co-operative federalism is to attenuate this independence, although it is difficult to envisage any circumstances which would give both the federal and provincial governments important tasks to perform while making it impossible for either level to frustrate the







objectives of the other. In this situation, co-operative federalism provides both a hope and a challenge.







1. Difficulties of Divided Jurisdiction, A Study Prepared for the Royal Commission on Dominion-Provincial Relations, Ottawa, 1940, p. 10.
2. Mr. Fulton did, however, submit the federal draft proposal to a selected group of law professors for their comment.
3. For one of the only systematic attempts in this direction see Edwin R. Black, "Federal Strains within a Canadian Party", paper presented to the Annual Meeting of the Canadian Political Science Association, Charlottetown, 1964, (mimeo).
4. Donald V. Smiley, "The Two Themes of Canadian Federalism", XXI Canadian Journal of Economics and Political Science, (February 1965), p. 88.
5. Daniel Johnson, Egalité on Independance, Montréal, 1965, p. 73.
6. Peace, Order and Good Government, Toronto, 1964.
7. Ten to One: The Confederation Wager, Toronto, 1965.
8. Economic Policy in a Federation, n.p., n.d. (1963 or 1964?), (mimeo), p. 21.
9. ibid. p. 45.
10. ibid. pp. 145-148.







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Le fédéralisme exécutif: critique  
de la thèse du professeur Smiley

"Etude présentée au  
Groupe d'étude C"

Paul Dussault







Introduction: Centralisation versus décentralisation

Première partie: Les divergences dans la conception du rôle de l'Etat

- I- Analyse de Hodgetts
- II- La fonctionnalité de l'état
  - A- le niveau supra-fonctionnel
  - B- le niveau infra-fonctionnel
  - C- le niveau fonctionnel

Deuxième partie: Les exigences du fédéralisme

- I- Les difficultés: la troisième condition
- II- Le déclin du Parlement
- III- Le fédéralisme exécutif: cul-de-sac

Conclusion: Les solutions de rechange

Le statut particulier







## INTRODUCTION

M. Smiley, dans son ouvrage sur le fédéralisme canadien, présente les mérites d'un mode de relations fédérales-provinciales, le "fédéralisme exécutif". Ce système prévoit l'édification de nouvelles structures à l'intérieur desquelles s'établirait le rapport de force entre le gouvernement central et les gouvernements régionaux et réduirait les tensions existantes entre ces deux ordres de gouvernement.

Depuis moins d'une décennie, alors qu'auparavant les initiatives dans tous ces domaines étaient prises par l'état central, les états provinciaux assument davantage leurs responsabilités surtout dans le domaine économique et social. En effet les provinces cherchent de nouveaux moyens pour rendre leur action efficace. Les investissements du Fédéral de 1956 à 1964 ont baissé de 15% alors que ceux des gouvernements provinciaux et municipaux se sont accrus pour la même période de 60%. Pour faire face à cette situation nouvelle, les provinces ont dû revaloriser leur fonction publique, élaborer des politiques à long terme et trouver les moyens de financer leurs nouvelles entreprises. Les résultats de ces changements se décrivent difficilement. Soulignons toutefois un fait: l'état provincial a grossi et son pouvoir de marchandage auprès du Fédéral s'est accru.







Le régime fédératif canadien n'est d'ailleurs pas le seul qui évolue. Carl J. Friedreck, dans son analyse des démocraties constitutionnelles, remarquait que le fédéralisme, en temps que système constitutionnel évolue rapidement.

"Un vaste domaine de coopération effective entre les états et le gouvernement fédéral s'est développé à l'avantage aussi bien des uns que de l'autre sans pour autant détruire nécessairement la division constitutionnelle des pouvoirs conçus dans un sens plus large... Miss Clark voit venu le jour où le caractère d'un état sera transformé et modifié en une sorte d'unité administrative dont le rôle sera de faire exécuter la politique et les plans fédéraux."<sup>1</sup>

Retenons deux idées: d'abord que la thèse du fédéralisme transitoire, à savoir, le fédéralisme comme système ne résiste pas, il aboutit soit aux états-associés, soit à l'unitarisme; ensuite l'idée que la coopération ne détruit pas la division des pouvoirs.

La première, soit-disante loi, le caractère transitoire du fédéralisme, n'a jamais été démontré. A partir de la constatation que le fédéralisme est un équilibre pouvant se détruire facilement, on généralise à outrance.

La deuxième loi ressemble à ces postulats ambigus sur lesquels les leaders charismatiques basent leurs politiques. Le fonctionnement d'un régime fédératif dépend

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1. Carl S. Friedreck "La démocratie constitutionnelle", "Presses universitaires de France", 1958, pp. 270-72.







toujours des conditions locales, subjectives et objectives et l'argument que le fédéralisme coopératif fonctionne dans un pays en particulier ne signifie pas qu'il sera la réponse aux difficultés canadiennes.

Tant de théoriciens ont abordé la question du fédéralisme au Canada que, sur le nombre, des thèses fort originales, les unes plus acceptables, les autres moins, ont été proposées. Parmi les thèses méritant notre attention, nous pouvons situer les opposants: d'une part les fédéralistes intégristes et d'autre part les décentralisateurs.

Les plus pessimistes, les décentralisateurs, soutiennent que le régime actuel aboutit à l'irresponsabilité des gouvernants.

"Le partage au Canada des responsabilités constitutionnelles entre le fédéral et les provinces semble entraver la mise en vigueur des mesures qui s'imposent d'urgence, le chevauchement des compétences semble prêter à confusion, les prérogatives du fédéral s'adaptent mal à celles du provincial, bref, tout favorise l'irresponsabilité des gouvernants." <sup>2</sup>

Les optimistes, intégristes, prétendent le contraire:

"...ces dernières années, de responsables politiciens et fonctionnaires canadiens ont fait preuve d'un talent considérable en face des circonstances causées par l'interdépendance fédérale-provinciale..." <sup>3</sup>

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2. Charles Taylor, Cité libre, livret 65, p.9

3. Smiley - Rapport, p. 242 - Traduction.







Des circonstances particulières pourraient entraver sérieusement la mise en oeuvre des politiques complémentaires au Canada. Nous tenterons de présenter dans ce travail un résumé des principaux arguments qui nous inciterait à croire que la pratique du "fédéralisme exécutif" aboutira dans un régime politique ne pouvant satisfaire aux aspirations et aux besoins des Canadiens.

Notre position se résume ainsi. Sans dogmatisme, nous prétendons que la thèse des décentralisateurs correspond mieux à la réalité canadienne observable que celle des intégristes, i.e. que les facteurs de décentralisation l'emportent sur les facteurs d'intégration et que le fédéralisme exécutif a peu de chances de réussir parce que les conditions essentielles à son fonctionnement brillent par leur absence.







## PREMIERE PARTIE: LA CONCEPTION DU ROLE DE L'ETAT

### I- Analyse de Hodgetts

Le professeur J.E. Hodgetts de l'université de Toronto, dans un article récent <sup>4</sup> examinait, à la lumière d'une théorie de Gabriel Almond, l'effet du développement des intérêts régionaux sur les structures fédérales canadiennes.

Le fédéralisme canadien classique, soutient-il, reposait sur trois postulats qui aujourd'hui ne sont plus acceptables.

D'abord, la méthode de rassembler les intérêts divers des citoyens dans un réservoir dans lequel on puisait ensuite les politiques fédérales, nécessitait la concurrence de deux partis nationaux. En second lieu, on admettait une séparation entre les agences qui transposait les intérêts du peuple en politiques nationales et les agences qui s'occupaient strictement de mettre en oeuvre ces politiques. Enfin, on croyait que les provinces et le fédéral occupaient des champs de juridiction définis d'une façon relativement claire et précise par l'Acte de l'Amérique du Nord britannique.

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4. C.J.E.P.S. - Février 1966 - "Regional Interests and Policy in a Federal Structure". p. 3 & 14.







Aujourd'hui toutefois, souligne M. Hodgetts, la situation n'est plus la même, nos structures fédérales doivent être adaptées à de nouveaux besoins:

"The larger question of Parliament's capacity to convert such regional demands into acceptable policy outputs also constitutes a major challenge to our ingenuity...at the present intermediate stage of growth governmental agencies are all energetically throwing themselves into the breach and we are already faced with such a maze of special regions that we may be unable to co-ordinate disparate regional entities. If this development persists we must abandon any hopes we have of gearing our institutions and policies to the conception of a single Canadian political system."<sup>5</sup>

Nous croyons que "l'ingéniosité" ne suffirait pas, que les causes du malaise confédératif actuel sont plus profondes, par exemple, la divergence dans la conception du rôle de l'Etat.

Jacques-Yvan Morin donne un aperçu de la conception du rôle de l'Etat au Québec:

"Le moment est venu de bâtir au Québec un Etat moderne qui soit le serviteur de la collectivité, en même temps que l'un de ses moteurs. Les citoyens acceptent de plus en plus cette orientation progressive et le gouvernement provincial actuel s'est senti suffisamment soutenu pour créer le Conseil d'orientation économique et la Société générale de financement et pour instituer l'assu-







rance-hospitalisation....de fait, les besoins à satisfaire restent extrêmement chargés: domestiquer, planifier l'économie au profit du peuple, ouvrir les portes de l'enseignement secondaire et de l'université à tous ceux qui, dépourvus de moyens, ont le talent nécessaire pour servir la collectivité, construire une société fondée sur la justice, l'engagement des citoyens et la liberté, qui soit en même l'héritière des traditions les plus fécondes et le reflet de la culture Au Canada français.

...le nouveau concept de l'Etat provincial que nous venons de décrire heurte de front l'idéal anglo-canadien d'un Etat fédéral dynamique et puissant..."<sup>6</sup>

Daniel Johnson présente son concept de l'Etat:

"Par la force des choses, l'Etat est devenu le principal architecte des structures économiques et sociales. C'est de lui que dépend dans une très large mesure le cadre de notre vie quotidienne." <sup>7</sup>

Le québécois en général désire un Etat provincial fort, planificateur. Il nous faut donc répondre à une première question, à savoir, quelle est l'influence de la conception de l'Etat sur le rapport des forces entre les niveaux du gouvernement.

A première vue on se rend compte que les provinces ont édifié, depuis 1945, des structures sociales, économiques et politiques qui les distinguent. Il ne s'agit pas ici de mesurer cette différence mais bien de savoir

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6. Jacques-Yvan Morin "Vers un nouvel équilibre constitutionnel au Canada" paru dans "L'avenir du fédéralisme canadien" p. 144.
  7. Daniel Johnson - Le Devoir, 1er juin 1965: "Le salut de la langue est lié à la forme des institutions et l'autonomie de l'Etat québécois".







quel en est le résultat, i.e. l'effet des caractéristiques régionales sur l'ensemble des rapports fédéral-provinciaux.

Nous tenterons donc, utilisant comme cadre conceptuel la théorie fonctionnelle de l'Etat du professeur Bergeron, d'établir un schéma général du rôle de l'Etat, afin de dégager quelques concepts-clefs à la lumière desquels nous analyserons la théorie du professeur Smiley.

Aucune théorie politique n'est complète. La systématisation d'opinions demeure encore de nos jours un processus à la fois subjectif et objectif.

Aux fins de notre étude toutefois, afin de présenter une vue d'ensemble des nombreux facteurs, qui nous est matériellement impossible d'analyser à fond, il sera nécessaire de suivre un fil d'Arianne, d'où la nécessité d'utiliser un système théorique.

## II- La fonctionnalité de l'état

Le professeur Bergeron analyse l'Etat en terme de rapports relation-contrôle-fonction.<sup>8</sup> Nous retiendrons, aux fins de notre analyse, le concept de fonction.

Essentiellement, donc, l'Etat se conçoit selon 3 niveaux: infra-fonctionnalité, supra-fonctionnalité et fonctionnalité. Le niveau infra-fonctionnel inclut:

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8. Bergeron, Gérard, "Essai d'une théorie fonctionnelle de l'Etat moderne" mimeo.







"des manifestations plurales...le plus souvent diffuses, pour une part ou parfois spécialisées, structurées ou structurables, mais jamais fonctionnalisées au sens strict, du dynamisme global de l'organisme qui trouve, dans le tissu humain collectif constituant la "matière" infrafonctionnelle, son substrat, enracinement premier..."<sup>9</sup>

au niveau supra-fonctionnel se retrouve:

"une détermination active par laquelle un organisme social, vu comme une unité collective réelle, est en train de naître, croît ou maintient son unité et sa cohésion interne, son identité propre par rapport aux autres organismes sociaux qu'il intègre et même par rapport à l'organisme plus grand qui peut l'intégrer".<sup>10</sup>

Entre ces deux niveaux, il y a le niveau de la fonctionnalité, soit "des séries d'activités, liées les unes aux autres en processus d'action et vérifiées par leur commune participation à la vie de cet organisme".<sup>11</sup>

#### 1.- Le niveau supra-fonctionnel: l'idéologie

Gouverner, selon René Lévesque, c'est "choisir":

"...et essentiellement choisir des priorités. On ne peut pas tout faire, c'est impossible: alors il faut choisir, choisir en fonction des priorités établies selon des besoins, des besoins le plus honnêtement conçus en fonction de l'homme dans la société et non pas en fonction des machines ou des organisations..."<sup>12</sup>

9. Id. p. 16

10. Ibid

11. Ibid

12. Congrès des Affaires canadiennes, 1961.







Nous avons souligné que de cette conception du gouvernement se dégage une conception de l'Etat qui diffère de la conception anglo-saxonne. Alors que les provinces anglophones semblent concevoir l'Etat d'un point de vue essentiellement libéral, le Québec exige de son gouvernement une participation active dans la vie de ses citoyens.

Jacques Parizeau soutenait en 1963 que l'idéologie canadienne se divisait:

"...the idea of regional planning and economic organization started to spread timidly at first and then with growing insistence. Possibly, the Province of Quebec is the most advanced at the moment in that direction".<sup>13</sup>

Depuis 1965, des pas de géant dans le sens d'un plan d'ensemble ont été accompli au Québec; c'est toute l'idéologie québécoise qui en fut transformée:

"Nous sommes devant une nation qui s'est donnée ses premières définitions idéologiques d'elle-même au moment où elle était encore une "société paysanne". Elle a subi ensuite, à un rythme extrêmement rapide l'impact de l'industrialisation...deux traits principaux paraissent les distinguer de l'ancienne idéologie unitaire: le rôle important accordé à l'Etat, la volonté résolue d'une ample politique industrielle dont les canadiens-français auraient la maîtrise".<sup>14</sup>

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13. Economic Planning in a Democratic Society. 9th C.I.P.A. Winter Conference, Toronto, 1963.

14. Dumont, F. La représentation idéologique des classes au Canada français. (miméo)







Le changement d'idéologie au Québec s'explique d'une part, par la recrudescence du nationalisme et d'autre part par l'industrialisation.<sup>15</sup>

#### B- Le niveau infra-fonctionnel - les structures

Non seulement le niveau de développement des provinces au Canada varie, mais l'économie est régionaliste.

Au Québec, l'industrie privée est en bonne partie contrôlée par des étrangers, lesquels tentent évidemment de maintenir leur monopole. Le Québécois donc, à mesure que la province s'industrialise, a tendance à s'orienter vers l'industrie publique, à cause des meilleures chances d'avancement; l'état devient un employeur important et considéré. Bon nombre de travailleurs ont passé ainsi du primaire au secondaire grâce au développement des industries provinciales, à l'intérieur de nouvelles structures établies depuis 1960.

#### C- Le niveau fonctionnel

Ainsi, la Province de Québec se distingue des autres provinces canadiennes au niveau de la supra-fonctionnalité et au niveau de l'infra-fonctionnalité. Or, la fonctionnalité, i.e. l'ensemble des processus d'action, dépend de ces deux sources, infra et supra. Ainsi au niveau fonctionnel,

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15. Trois auteurs partagent cet opinion. Falardeau, J.C. "Les Canadiens français et leurs idéologues dans "la dualité canadienne" soutient: "...le second pôle d'intégration des attitudes collectives au Canada français a été la pensée nationaliste". Domenach J.M. "Le Canada français, controverse sur un nationalisme." Esprit, Fe. 65 et Garrigue, P. "L'option politique du Canada français: une interprétation de la survivance nationale".

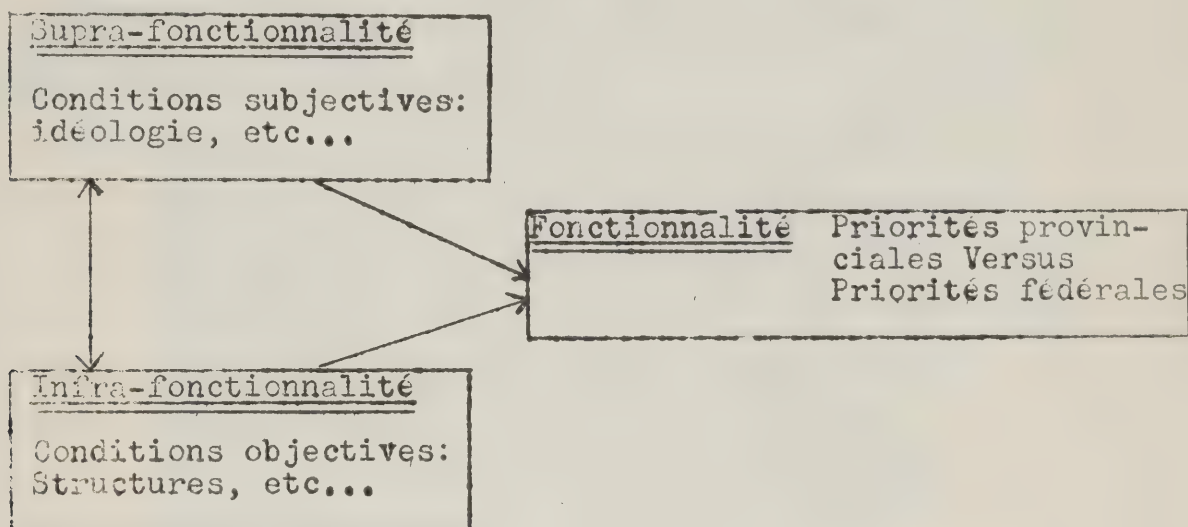






la Province de Québec, à cause de son idéologie et de ses structures différentes établira des priorités autres que celles des neuf provinces anglophones.

Le rapport de force aboutit à un conflit de priorités, tel que représenté au tableau suivant:



Ainsi, le Québec, pour satisfaire aux besoins de la collectivité, a entrepris de rajeunir ses structures et l'ensemble des processus d'action aboutit à la planification provinciale.

Dès 1956, François-Albert Angers avait entrevu ce besoin d'un régime nouveau:

"La vie économique comme la vie sociale et la vie politique semblent commander une forme d'intervention organique, décentralisée, selon toujours le principe de l'action supplétive."<sup>16</sup>

A la conférence de l'Institut canadien des Affaires publiques, en 1962, Henry Mhun abondait dans le

16. François Albert Angers - La centralisation et les Relations fédérales-provinciales. Commission royale d'enquête sur les problèmes constitutionnels. Québec, 1956, p. 241.







même sens:

"La réalisation d'une telle (sic) politique nécessite une planification souple et démocratique...car si l'état est l'interprète du bien commun, il ne saurait le déterminer tout seul; il n'en a pas le monopole; le bien commun se détermine en commun."

Lors du colloque de l'Iccep l'année suivante

Jacques Parizeau pose le problème:

"Possibly, the Province of Quebec is the most advanced at the moment in that direction. (Planning) Not that achievements are already striking, but the authorities and the public have accepted the idea of planning more readily than other parts of the country...but so far as this sort of regional emphasis gains in intensity, the problem of coordination becomes correspondingly acute, so that planning at the federal level with few references to regional projects and plans might only create considerable confusion; it might also be largely ineffective. Thus we cannot escape the conclusion that economic planning in Canada, while undoubtedly necessary, is going to be a very complex operation. 17

En 1964, Parizeau précisait davantage. Lors de la dix-huitième conférence annuelle sur la taxation, il déclarait:

"Most of the problems of federalism that have emerged in the last few years,

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17. Economic Planning in a democratic society - 9th CIPA winter Conference, 1963. p. 63-64 (Seminar)







can be classified into two main categories: what we may call fiscal arrangements on the one hand, and policy coordination on the other". 18

L'auteur remarque ensuite comme il est difficile dans un système fédéral d'établir un ordre de priorités:

"Each level of government can determine priorities independantly of each other. Both can seek rapidly in the red, and then when deficits have reached a certain level, fight for some time over sharing of fiscal resources..."19

Paul Sauriol, dans un éditorial, décrit le conflit des priorités au Canada:

"On aura du mal à s'entendre sur les priorités, non seulement parce qu'il est difficile de faire un choix entre des besoins essentiels, mais aussi parce que les urgences ne sont pas les mêmes dans toutes les régions du pays."

En 1964, Cité Libre publiait le "Manifeste pour une politique fonctionnelle". Alfred Dubuc, dans un article récent partageait le point de vue cité-libriste.

"En parlant de planification, les auteurs du Manifeste se sont rapprochés du problème public véritable. En effet, constatant les difficultés que pose une politique globale de planification dans un

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18. "Report of Proceedings of the 18th annual tax conference- Nov. 64 Montreal." Canadian tax foundation, 1965 Jacques Parizeau colloque sur les développements des relations fiscales entre le fédéral et les provinces. p. 222

19. - id.







pays où le pouvoir est partagé entre divers niveaux de gouvernement, ils croient qu'il est permis de se demander si toute cette planification ne produira jamais autre chose que des tiraillements inter-gouvernementaux et inter-ministériels et ne contribuera à faire croître autre chose que la confusion." 20

Ainsi, plusieurs auteurs croient que le régionalisme provincial serait incompatible avec une planification ou une liste de priorités au palier fédéral.

Paul Gérin-Lajoie considère que les conférences fédérales provinciales ont justement fourni au Québec (et dans une certaine mesure aux autres provinces) une occasion de prouver que "les buts, les aspirations et les priorités" fixés par une province ne s'agençaient pas toujours harmonieusement avec les buts, aspirations et priorités des autres régions du pays. 21

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20. "Une interprétation économique de la Constitution. Socialisme 66, janvier 66. Jacques Yvan Morin dans un cours télévisé parle du dilemme du fédéralisme coopératif, miméo-Université de Montréal. Voir aussi le mémoire de la Presse étudiante nationale (740-271): p. 58, "pour se développer au Canada, le fédéralisme coopératif demande une homogénéité que nous n'avons pas et dont nous ne voulons pas;" et Claude Julien - Le Canada dernière chance de l'Europe, Grasset 1965, p. 208...

21. Le Devoir 14 avril 1965 - Paul Gérin-Lajoie. "Le Québec est vraiment un état même s'il n'a pas la souveraineté entière" voir aussi Paul Sauriol.. Le Devoir 15 octobre 1964.







## DEUXIEME PARTIE: LES EXIGENCES DU FEDERALISME

La coordination et la coopération au niveau fédéral a connu des soubresauts durant les dernières années. La solution du Professeur Smiley est-elle viable? En d'autres mots, peut-on concevoir un régime fédératif dans lequel les gouvernements provinciaux possèdent les juridictions importantes alors que le gouvernement central tient les cordons de la bourse publique.

### I Les Difficultés

Les points les plus irritants des relations fiscales canadiennes peuvent s'énumérer ainsi:

1. les dépenses des gouvernements provinciaux et municipaux dépassent maintenant les dépenses fédérales alors que le Fédéral perçoit et distribue la majorité des impôts. Durant l'année fiscale 1966-67 - les provinces percevront 24% de l'impôt sur le revenu des particuliers, 9% de l'impôt des corporations, 75% des taxes de succession.
2. Les dépenses d'investissement des provinces s'élèvent à près de 4 milliards alors que les dépenses fédérales de même nature s'élèvent à 1 milliard. Ainsi, il devient de plus en plus difficile pour le gouvernement central d'exercer un contrôle sur l'économie nationale.







### 3. Les provinces tentent de réglementer leur économie régionale.

Federal policies can seldom take into account all regional differences and apply themselves to the differences as well as the whole. Employment policies, for instance can still have high unemployment in one area while erasing it in another. The provinces feel they can tailor some policies to their regions better than Ottawa can. 22

### 4. Les programmes à frais partagés obligent les provinces à mettre en oeuvre des projets conçus à Ottawa, alors qu'elles aimeraient prendre part à l'élaboration de ces projets.

### 5. Les provinces acceptent difficilement que Ottawa élabore tout seul une politique monétaire et fiscale: Les dettes provinciales et municipales s'accumulent plus rapidement que la dette fédérale -

Paul Sauriol discute de l'impasse:

"l'ampleur financière des programmes à frais partagés révèle une évolution grave et qui, selon M. Scott, devra être corrigée. C'est que les besoins des provinces et des villes grandissent plus vite que ceux d'Ottawa... le gouvernement fédéral est exposé à perdre le contrôle des politiques fiscales et monétaires et de la planification économique...23

La province de Québec conçoit ces difficultés dans un cadre plus large:

"aujourd'hui, les provinces anglaises tendent à valoriser leur rôle au moins dans une certaine mesure pour protéger les intérêts économiques régionaux qu'elles incarnent. Ce phénomène

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22. Strong radical proposals for 11 piece government. Hyman Solomon Financial Post, Jan. 8/66. Pages 21-22.

23. Le Devoir, 26 mars 65 - Paul Sauriol - Les Programmes à frais partagés: un débat inquiétant.







ne touche pas aux domaines culturels ni à la sécurité sociale où Québec manifeste ses premières exigences. Mais pour les besoins de la décentralisation industrielle, des routes, les provinces anglaises, surtout celles qui ont progressé plus lentement expriment des exigences nouvelles. Ottawa hérite des difficultés et des problèmes les plus ardues, en particulier pour la répartition plus équitable de la richesse commune en faveur des régions moins favorisées.<sup>24</sup>

Jean-Marc Léger doute de la possibilité d'en arriver à une entente:

"pour des raisons qui dans l'optique de chacun sont légitimes, Ottawa et Québec sont engagés dans des mouvements contraires. La grande explication devra venir tôt ou tard. Ce n'est même pas la recherche du status particulier; pour l'heure, c'est uniquement la préservation de compétences sans lesquelles le fédéralisme serait vidé de son contenu. Précipitée par l'évolution du Canada et du Québec ces dernières années, la vraie crise de la fédération est encore à venir.<sup>25</sup>

D'autres se montrent plus optimistes:

"Sans doute, pourra-t-on allévier la crise par une série de compromis savamment dosés, notamment en matière fiscale. Toutefois, ce ne seront là que des "cataplasmes" qui n'atteindront pas les causes profondes du malaise. La tâche qui s'impose à nos hommes d'état paraît donc être l'établissement d'un nouvel équilibre qui permettent aux deux Canadas d'atteindre leurs objectifs socio-économiques et culturels respectifs, sans se brider mutuellement...<sup>26</sup>

Ainsi, la 3<sup>ième</sup> condition sans laquelle le fédéralisme coopératif ne saurait fonctionner serait difficile à obtenir:

...the results of federal-provincial collaboration satisfy in some degree the conflicting viewpoints of the French-speaking majority in Québec and of other Canadians about the

24. Sauriol, Paul, Exigences de la dualité canadienne - Le Devoir, 2 nov. 65.

25. Le Devoir - L'Extension des juridictions communes ruine le fédéralisme - 21 janvier 65.

26. Jacques Yvan Morin, Vers un nouvel équilibre constitutionnel dans l'absence du fédéralisme canadien, p. 146.







appropriate role of the federal government.<sup>27</sup>

Selon M. Johnson, cette condition ne se réalisera jamais:

"On convoque une Conférence fédérale-provinciale où l'on invite tous ceux qui ont des objections à les formuler. Comme le Québec est seul à rouspéter, il est facile de le mettre dans son tort. Car il ne s'agit pas, dans ces conférences d'un dialogue entre Québec et Ottawa et encore moins entre deux nations, mais d'un forum où il n'y a toujours qu'une province à majorité française parmi dix gouvernements à majorité anglophone... lorsque le gouvernement central détermine ainsi les droits des provinces, ce n'est plus du fédéralisme. Nous sommes en régime unitaire.<sup>28</sup>

## II Le Déclin du Parlement

Les deux autres conditions que le professeur Smiley considère comme essentielles au fédéralisme exécutif peuvent se résumer ainsi 1) les processus de décisions conjointes doivent satisfaire les demandes d'action gouvernementale que l'opinion publique soumet et 2) qu'il y ait le développement de "patterns" de comportement politique qui soutienne et encourage la collaboration au niveau des exécutifs.<sup>29</sup>

Les éditorialistes ont adressé de sérieuses critiques à l'endroit des conférences fédérales-provinciales et des ententes inter-ministérielles. Claude Ryan parle des conférences qui sapent l'autorité des parlements:

27. Smiley - Mimeo., p. 219.

28. Johnson - Le Devoir, 20 mars 65.

29. Smiley - Mimeo., p. 219.







"un autre résultant indirect des conférences fédérales provinciales aura été de reléguer au second plan le parlement fédéral comme source principale du pouvoir au Canada... 30  
 "...Avec la formule Fulton-Favreau, le problème nous rejoint de façon directe et aiguë. Nul, sauf les initiés du "innersanctum" gouvernemental, ne connaîtra jamais par le même détail l'histoire du consentement donné par les autorités québécoises".31

Les citoyens, donc, peuvent se trouver liés par des décisions de la plus haute importance décisions du "innersanctum" sans que l'opinion publique et les législateurs aient eu l'occasion de s'exprimer librement. Il semble que cette "démocratie supra-exécutive" soit une "déviation de notre mode de gouvernement".31

Ainsi la deuxième condition au fédéralisme exécutif - les "patterns" de comportement encourageant les décisions des exécutifs - serait inexistante. Le Parlement, d'organe souverain devient subordonné, ce que plusieurs considèrent comme une déviation.

Quant à la première condition, l'opinion publique se trouvant satisfaite des décisions des gouvernements, il serait nécessaire de constituer un corps qui soit représentatif de l'opinion publique pour canaliser les demandes du public, ce qui nécessiterait une réforme en profondeur de nos institutions.

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30. Le Devoir, 20 mars 65.

31. Le Devoir, 31 décembre 64 - Le Dialogue Canadien en 1964.







### III Le Fédéralisme Exécutif: cul-de-sac.

Nous avons donc soutenu qu'à cause d'une divergence dans la conception du rôle de l'Etat, de l'existence au Québec d'une idéologie différente et de structures économiques et sociales particulières, la province francophone élabore des politiques qui soit difficilement compatibles avec les intérêts des autres provinces. Il faut maintenant poser la question à savoir si, dans ces circonstances, la coordination et la coopération, les deux piliers du fédéralisme exécutif, sont possibles. Jacques Parizeau évalue la situation:

"No matter what future constitutions will have to say about fields of exclusive jurisdiction, it is obvious that such rights do not mean much in relation to modern economic policies. Quebec for instance, cannot build a steel mill without having some idea as to what kind of duties might be applied to steel; and it certainly will not agree for long to be treated in this respect as a private company. Similarly, provincial planners will not accept indefinitely to consider monetary policy as something akin to the weather. Without even the help of a weather bureau. On the other hand the federal government cannot fundamentally accept that the larger part of the public sector be absolutely unconnected to contracyclical policies. And huge public borrowings abroad without any references to the state of the balance of payments or the exchange rate policy will not always be acceptable.<sup>32</sup>

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32. Parizeau - Dans "L'Avenir du Fédéralisme Canadien", p. 56.







Conclusion: Les solutions de rechange

Si le fédéralisme centralisé a de faibles chances de succès, il n'en reste pas moins que le fédéralisme décentralisé se saurait satisfaire sans un minimum essentiel de coopération et de coordination.

Selon qu'une province optera en faveur d'une intervention plus ou moins poussée du fédéral, son statut se "particularisera". Ainsi le statut particulier apparaît comme la seule alternative au fédéralisme exécutif, les provinces ne pouvant s'entendre sur une repartition conforme des responsabilités entre les niveaux de gouvernements:

"Malgré les revendications régionales, les neuf provinces à majorité anglaise vont adopter avec Ottawa un type de relation fédérale bien différent de celui du Québec qui deviendra une province de moins en moins comme les autres".<sup>33</sup>

Dans un système donc où chaque province est libre, à l'intérieur de certaines limites, de définir son statut par rapport au gouvernement central, les gouvernements provinciaux pourront plus facilement satisfaire ceux de leurs besoins qu'ils jugent prioritaires. Ensuite, les provinces auront avantage à prendre part à la détermination et à la mise en oeuvre des politiques fédérales sur lesquelles on s'accordera.

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33. Sauriol, Le Devoir, 2 novembre 1965, p.4. "Exigences politiques..."







Pour reprendre les mots du premier ministre Lesage, dans son mémoire à la conférence fédérale-provinciale de 1963:

"C'est ainsi que le Québec comprend le 'fédéralisme coopératif'. Celui-ci doit, d'un côté, permettre aux provinces de disposer des moyens qui leur sont nécessaires pour s'acquitter de leurs responsabilités, et, de l'autre, donner lieu à l'élaboration conjointe et réfléchie des politiques économiques".<sup>34</sup>

Il y aurait donc d'abord le statut des provinces et leurs compétences législatives plus ou moins étendues, ensuite coopération et coordination quant aux intérêts communs.

Nous voyons qu'il est souhaitable, qu'au Canada, le fédéralisme évolue dans ce sens.

34. Imprimeur de la Reine "Conférence Fédérale-Provinciale - 1963", p. 49.







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